92-1718

No. _____

Supreme Court, U.S.
FILED
APR 26 1993
OFFICE OF THE CLERK

In The Supreme Court of the United States

OCTOBER TERM, 1992

HAMILTON TAFT & COMPANY,
Petitioner,

v.

FEDERAL EXPRESS CORPORATION,
STANFORD UNIVERSITY HOSPITAL, THE BOARD OF TRUSTEES OF
LELAND STANFORD JUNIOR UNIVERSITY, AND
FREDERICK S. WYLE AS TRUSTEE FOR
HAMILTON TAFT & COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

JACK T. FRIEDMAN
DAVID M. RICE*
CARROLL, BURDICK & McDONOUGH
44 Montgomery Street, Suite 400
San Francisco, CA 94104
Telephone: (415) 989-5900
Attorneys For Hamilton Taft & Company

April 26, 1993

*Counsel of Record

61 pp

QUESTION PRESENTED

Whether a district court may dismiss as moot an involuntary debtor's appeal from a bankruptcy court order for relief, where, if the district court instead reversed, the debtor would have a statutorily authorized right to pursue a substantial monetary remedy against those who improperly filed the involuntary petition?

PARTIES AND RULE 29.1 STATEMENT

PARTIES

Debtor and Appellant:
Hamilton Taft & Company

Petitioning Creditors and Appellees:
Federal Express Corporation
Stanford University Hospital
Board of Trustees of Leland Stanford Junior University

Trustee for Hamilton Taft & Company and Appellee:
Frederick S. Wyle

RULE 29.1 STATEMENT

The stock of petitioner Hamilton Taft & Company is owned by Knightsbridge Company, Inc. Petitioner has no wholly or partially owned subsidiaries.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	6
A. Denying Appellate Review in Involuntary Bankruptcy Proceedings Based on Alleged Equitable Grounds Is in Fact Unfair to Alleged Debtors and Encourages the Use of Involuntary Proceedings for Improper Purposes, in Violation of Clear Congressional Intent	6
B. There Is Disagreement Among the Circuits Whether "Equity," and in Particular "Finality," Can Justify a Mootness Determination, When the Court Can in Fact Grant Effective Relief	11
CONCLUSION	18

TABLE OF AUTHORITIES

Cases **Page(s)**

Algeran, Inc. v. Advance Ross Corp.,
759 F.2d 1421 (9th Cir. 1985) 13, 14
Bartmann v. Maverick Tube Corp.,
853 F.2d 1540 (10th Cir. 1988) 8
Basin Elec. Power Cooperative v. Midwest Processing Co.,
769 F.2d 483 (8th Cir. 1985), *cert. denied*, 474 U.S.
1083 (1986) 7, 8
Board of Trustees of Leland Stanford Jr. Univ. & Stanford Univ. Hosp. v. Hamilton Taft & Co., et al.,
CV 91-0798 CAL (N.D. Cal.) 3
Camelot, Inc. v. Hayden,
30 B.R. 409 (E.D. Tenn. 1983) 9
Consumers Union of United States v. Kissinger,
506 F.2d 136 (D.C. Cir. 1974), *cert. denied*, 421 U.S.
1004 (1975) 12
Federal Express Corp. v. Hamilton Taft & Co., et al.,
CV 91-0752 VRW (N.D. Cal.) 3
Globe Newspaper Co. v. Superior Court,
457 U.S. 596 (1982) 12
Hall v. Beals,
396 U.S. 45 (1969) 12
Honig v. Students of California School for the Blind,
471 U.S. 148 (1985) 12
In re Advance Press & Litho, Inc.,
46 B.R. 700 (D. Colo. 1984) 6, 7, 9
In re Amburgey,
68 B.R. 768 (Bankr. S.D. Ind. 1987) 8
In re Andreuccetti,
975 F.2d 413 (7th Cir. 1992) 16
In re AOV Industries, Inc.,
792 F.2d 1140 (D.C. Cir. 1986) 16
In re Busick,
831 F.2d 745 (7th Cir. 1987) 8
In re Cantwell,
639 F.2d 1050 (3rd Cir. 1981) 13
In re Carroll,
903 F.2d 1266 (9th Cir. 1990) 13
In re Cates,
62 B.R. 179 (Bankr. S.D. Tex. 1986) 6, 9

TABLE OF AUTHORITIES
(continued)

Page(s)

In re Chateaugay Corp.,
No. 92-5056, 1993 U.S. App. LEXIS 4407 (2d Cir. March 9, 1993) 16
In re Club Associates,
956 F.2d 1065 (11th Cir. 1992) 12, 16
In re Combined Metals Reduction Co.,
557 F.2d 179 (9th Cir. 1977) 13, 15
In re Gilchrist,
891 F.2d 559 (5th Cir. 1990) 14
In re K.P. Enterprise,
135 B.R. 174 (Bankr. D. Me. 1992) 9
In re LaClede Cab Co.,
76 B.R. 687 (Bankr. E.D. Mo. 1987) 7
In re Mann,
907 F.2d 923 (9th Cir. 1990) 14
In re McMeekin,
18 B.R. 177 (Bankr. D. Mass. 1982) 6, 7, 16
In re Nordbrock,
772 F.2d 397 (8th Cir. 1985) 7, 8
In re Onouli-Kona Land Co.,
846 F.2d 1170 (9th Cir. 1988) 13
In re R. Eric Peterson Constr. Co.,
951 F.2d 1175 (10th Cir. 1991) 6
In re Reid,
773 F.2d 945 (7th Cir. 1985) 6, 8, 9
In re Reid,
854 F.2d 156 (7th Cir. 1988) 9
In re Roberts Farms, Inc.,
652 F.2d 793 (9th Cir. 1981) 13
In re Salmon,
128 B.R. 313 (Bankr. M.D. Fla. 1991) 7, 9, 10
In re Sax,
796 F.2d 994 (7th Cir. 1986) 14
In re SBA Factors of Miami, Inc.,
13 B.R. 99 (Bankr. S.D. Fla. 1981) 7, 10
In re Stadium Management Corp,
895 F.2d 845 (1st Cir. 1990) 14
In re Sullivan Central Plaza, I, Ltd.,
914 F.2d 731 (5th Cir. 1990) 12, 15

TABLE OF AUTHORITIES
(continued)

Page(s)

In re Tarasi & Tighe,
88 B.R. 706 (Bankr. W.D. Pa. 1988) 8
In re Tri-County Farm Equip. Co.,
87 B.R. 667 (D. Kan. 1988) 8
Iron Arrow Honor Society v. Heckler,
464 U.S. 67 (1983) 12
Miami Center Ltd. Partnership v. Bank of New York,
838 F.2d 1547 (11th Cir. 1988), *cert. denied*, 488 U.S. 823 (1988) 16
Mills v. Green,
159 U.S. 651 (1895) 11
Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.,
458 U.S. 50 (1982) 10
Paradise Hotel Corp. v. Bank of Nova Scotia,
842 F.2d 47 (3rd Cir. 1988) 6, 9
Raymark Industries, Inc. v. Lai,
973 F.2d 1125 (3rd Cir. 1992) 16
Stewart v. Southern Railway Co.,
315 U.S. 283 (1942) 12
United States v. Salerno,
932 F.2d 117 (2d Cir. 1991) 14
Valley Nat. Bank v. Trustee for Westgate-California Corp.,
609 F.2d 1274 (9th Cir. 1979), *cert. denied*, 444 U.S. 1015 (1980) 13
Wyle v. Armstrong,
No. C-91-2138 CAL (N.D. Cal.) 5

Statutes and Rules

11 U.S.C. § 303 . . . . . 2, 3, 5-9, 11
11 U.S.C. § 303(b)(1) 7, 8
11 U.S.C. § 303(g) 7
11 U.S.C. § 303(h) 3
11 U.S.C. § 303(i) 4, 9, 11, 15
11 U.S.C. § 303(i)(1) 9
11 U.S.C. § 303(i)(2) 9
11 U.S.C. § 303(i)(2)(B) 9
11 U.S.C. § 363(m) 14
11 U.S.C. § 303(h)(1) 3, 8

TABLE OF AUTHORITIES
(continued)

	Page(s)
28 U.S.C. § 157(b)	10
28 U.S.C. § 158(a)	5, 10, 15
28 U.S.C. § 158(d)	5, 10, 15
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1334	5
28 U.S.C. § 1334(a)	10
28 U.S.C. § 1334(b)	10
Fed. R. Bankr. P. 8001(a)	10, 15

Other Authorities

30 Cong. Rec. S7618 (June 19, 1984)	8
Moore, James Wm., et al., 6A *Moore's Federal Practice* ¶ 57.13 (2d ed. 1993)	12

No. _____

In The Supreme Court of the United States

OCTOBER TERM, 1992

HAMILTON TAFT & COMPANY,
Petitioner,

v.

FEDERAL EXPRESS CORPORATION,
STANFORD UNIVERSITY HOSPITAL, THE BOARD OF TRUSTEES OF
LELAND STANFORD JUNIOR UNIVERSITY, AND
FREDERICK S. WYLE AS TRUSTEE FOR
HAMILTON TAFT & COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Hamilton Taft & Company seeks review of a decision of the United States Court of Appeals for the Ninth Circuit affirming the district court's order dismissing as moot petitioner's appeal from four bankruptcy court orders.

OPINIONS BELOW

The court of appeals affirmed an order of the United States District Court for the Northern District of California dismissing petitioner's appeal from four orders of the United States Bankruptcy Court for the Northern District of California. The affirmance is reported in a table located at 985 F.2d 572, and the opinion is Petitioner's Appendix A (Pet. App. 1a). The order of the district court dismissing petitioner's appeal is Petitioner's Appendix B (Pet. App. 8a), and the supporting findings of fact and conclusions of law are Petitioner's Appendix C (Pet. App. 10a). The bankruptcy court's order appointing a trustee is Petitioner's Appendix D (Pet. App. 16a); the order appointing Frederick S. Wyle as trustee is Petitioner's Appendix E (Pet. App. 17a); the findings of fact and conclusions of law in support of the trustee appointment orders are Petitioner's Appendix F (Pet. App. 19a); the order for relief is Petitioner's Appendix G (Pet. App. 23a); the order granting summary judgment on the order for relief is Petitioner's Appendix H (Pet. App. 24a); the findings of fact and conclusions of law in support of the summary judgment order are Petitioner's Appendix I (Pet. App. 26a); and the order closing down the debtor's business operations is Petitioner's Appendix J (Pet. App. 29a).

JURISDICTION

The court of appeals entered judgment on January 25, 1993. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The text of 11 U.S.C. § 303, concerning involuntary bankruptcy cases, is Petitioner's Appendix K (Pet. App. 31a).

STATEMENT OF THE CASE

Petitioner Hamilton Taft & Company was a payroll tax processing service, computing and filing payroll taxes on behalf of its clients. Hamilton Taft generally received no fees for providing this service; instead, the written service agreements expressly

provided that Hamilton Taft would be compensated by the right to take advantage of the "float," that is, the time value of money in its possession before it was transferred to the taxing authorities. The agreements contained no express limitations on Hamilton Taft's discretion to use the float as it saw fit; they did, however, require that the customers give notice of termination, so that Hamilton Taft could adjust its operations to account for the loss of otherwise expected funds.

Nevertheless, a number of Hamilton Taft's customers, without notice, abruptly stopped making payments to Hamilton Taft in early March 1991, crediting the report of a Hamilton Taft ex-employee that Hamilton Taft was "diverting" funds. Despite reassurances from Hamilton Taft's management that all funds could be accounted for, several Hamilton Taft customers, including Federal Express, Stanford University and Stanford Hospital — all respondents here — filed civil proceedings in federal district court against Hamilton Taft and its management alleging breach of contract and various torts. *See Federal Express Corp. v. Hamilton Taft & Co., et al.*, CV 91-0752 VRW (N.D. Cal.); *Board of Trustees of Leland Stanford Jr. Univ. & Stanford Univ. Hosp. v. Hamilton Taft & Co., et al.*, CV 91-0798 CAL (N.D. Cal.).

When the plaintiffs in those actions failed to obtain district court orders imposing immediate, egregious restrictions on Hamilton Taft, they turned to the bankruptcy court. On March 20, 1991, the three corporate respondents here filed an involuntary bankruptcy petition against Hamilton Taft under 11 U.S.C. § 303. Six days later, over the vigorous objection of the involuntary debtor, the bankruptcy court appointed a trustee, respondent Frederick S. Wyle. Pet. App. 16a, 17a. Although the court had not yet entered an order for relief under 11 U.S.C. § 303(h), granting the involuntary bankruptcy, the trustee nevertheless rapidly proceeded to dismantle Hamilton Taft, over the debtor's objections. At a hearing held May 17, 1991, the bankruptcy court blessed that process by formally authorizing the trustee to shut down Hamilton Taft's operations. Pet. App. 29a.

At a hearing held May 31, 1991, the bankruptcy court granted a motion for summary judgment filed by the petitioning creditors and the trustee, and it entered the order for relief under 11 U.S.C. § 303(h)(1) the same day. Pet. App. 23a, 24a. The bankruptcy court rejected as a matter of law Hamilton Taft's contention

that the involuntary petition had been filed improperly. Hamilton Taft maintained that, until the petition was filed, it had always paid its customers' taxes. More importantly, Hamilton Taft contended that the petitioners' alleged "debts" were illusory, resulting from their breach of service contracts with Hamilton Taft. The bankruptcy court nevertheless refused to find that these alleged debts were "the subject of a bona fide dispute." Pet. App. 27a.

Hamilton Taft did not seek a stay because the bankruptcy court's bonding requirement clearly would have been too onerous. Hamilton Taft did, however, attempt to exercise its right to appeal to the district court from these adverse orders, including the two orders appointing the trustee, the order to close the business, and the order for relief.[1] While the appeals were being briefed, the creditors filed a motion to dismiss the appeals as moot. Hamilton Taft responded by arguing that, although the trustee had, over the debtor's objections, shut down Hamilton Taft and sold many of its assets, the debtor retained an important statutory right under 11 U.S.C. § 303(i), and perhaps common law rights as well, to seek monetary damages, if it could establish that the order for relief had been sought and granted improperly. Hamilton Taft also argued that it was entitled to disgorgement of fees wrongfully paid to the trustee and his attorneys.

Nevertheless, on March 6, 1992, although briefing of the appeals was almost complete, the district court issued an order dismissing the appeals as moot on the grounds "that there has been a substantial change in circumstances since the filing of the bankruptcy petition and that Hamilton Taft failed to diligently pursue their available remedies to obtain a stay pending appeal." Pet. App. 9a. The district court acknowledged Hamilton Taft's argument that it had an effective monetary remedy, but nevertheless found that changed circumstances made it "inequitable for this Court to consider the merits of the appeals." Pet. App. 14a.

---

[1] The district court ultimately consolidated these four appeals. Pet. App. 8a.

Hamilton Taft appealed the district court's dismissal order to the Ninth Circuit.[2] That court on January 25, 1993 affirmed the district court order. Pet. App. 1a. In its opinion, the Ninth Circuit acknowledged, but rejected, Hamilton Taft's argument that "the district court erred because Hamilton has an effective remedy in its right to seek damages and disgorgement of fees from its creditors for wrongfully placing it in bankruptcy." Pet. App. 2a. The Ninth Circuit said that this argument was "largely beside the point," finding that the district court dismissal was justified based on equitable grounds, which rendered it irrelevant whether the court had the power to grant effective relief:

> The district court held not only that it could not fashion relief, but that it *would* not. The court concluded that the comprehensive change of circumstances permitted by Hamilton's failure to seek a stay made judicial action inequitable.

Pet. App. 6a (emphasis in original).

Hamilton Taft has filed this petition seeking review of the Ninth Circuit's holding that an appellate court can refuse, on equitable grounds, to consider the merits of an appeal from a bankruptcy court order, even where a statutory claim for monetary relief would be available were the court to reverse.[3]

---

[2] The bankruptcy court had jurisdiction over this matter under 28 U.S.C. § 1334 and 11 U.S.C. § 303; the district court had jurisdiction to hear the appeals from the bankruptcy court under 28 U.S.C. § 158(a); the court of appeals had jurisdiction to hear the appeal from the district court under 28 U.S.C. § 158(d).

[3] As a postscript to these proceedings, Hamilton Taft notes that the trustee has filed adversary proceedings against Connie C. Armstrong, the former owner of Hamilton Taft, for breach of fiduciary duty and conversion, seeking more than $40 million in damages. *Wyle v. Armstrong*, No. C-91-2138 CAL (N.D. Cal.). The district court, in an order entered January 11, 1993, granted the trustee's motion for partial summary judgment as to liability by giving collateral estoppel effect to the bankruptcy court's findings in support of its order for relief.

REASONS FOR GRANTING THE WRIT

A. Denying Appellate Review in Involuntary Bankruptcy Proceedings Based on Alleged Equitable Grounds Is in Fact Unfair to Alleged Debtors and Encourages the Use of Involuntary Proceedings for Improper Purposes, in Violation of Clear Congressional Intent

Congress intended to place important restraints upon the use of involuntary bankruptcy petitions when it enacted, and subsequently amended, section 303 of the Bankruptcy Code, 11 U.S.C. § 303. In particular, section 303 requires not just that the debtor not be paying its debts as they become due, but in addition that at least three creditors file the involuntary petition, and that the debts upon which they base their involuntary petition not be subject to a bona fide dispute. Perhaps most importantly, Congress expressly provided within section 303 itself an important remedy for improperly filed involuntary bankruptcy petitions by giving involuntary debtors under such circumstances the right to seek costs and attorneys' fees, as well as compensatory and punitive damages. Congress intended, by providing these safeguards and remedies, to discourage improperly filed petitions and to provide a remedy for those who suffer the consequences of such petitions. Use of a judicially created "equitable" mootness doctrine to eliminate appellate review seriously undermines these protections and encourages more people to use the bankruptcy courts for improper ends.

Many courts have recognized that "the filing of an involuntary petition is an extreme remedy with serious consequences to the alleged debtor, such as loss of credit standing, inability to transfer assets and carry on business affairs, and public embarrassment." *In re Reid*, 773 F.2d 945, 946 (7th Cir. 1985); *accord In re Advance Press & Litho, Inc.*, 46 B.R. 700, 702 (D. Colo. 1984); *In re Cates*, 62 B.R. 179, 180 (Bankr. S.D. Tex. 1986); *In re McMeekin*, 18 B.R. 177, 177-78 (Bankr. D. Mass. 1982). The mere stigma of a bankruptcy filing can irrevocably injure a business, particularly a business that relies upon its goodwill and perceived financial soundness. *See, e.g., In re R. Eric Peterson Constr. Co.*, 951 F.2d 1175, 1177 (10th Cir. 1991) (involuntary petition "had a disastrous effect on [debtor's] financial health"); *Paradise Hotel Corp. v. Bank of Nova Scotia*, 842 F.2d 47, 48 (3rd Cir. 1988) (involuntary Chapter

7 petition, although disputed, "immediately created a crisis in relations between [debtor] and its other creditors," forcing debtor to file its own Chapter 11 petition). As one court stated:

> An allegation of bankruptcy is a charge that ought not to be made lightly. It usually chills the alleged debtor's credit and his sources of supply. It can scare away his customers. It leaves a permanent scar, even if promptly dismissed.

In re SBA Factors of Miami, Inc., 13 B.R. 99, 101 (Bankr. S.D. Fla. 1981). Consequently, "[e]ven the good-faith filing of such a petition creates onerous circumstances for a debtor." *In re Advance Press & Litho, Inc.*, 46 B.R. at 702.

The most serious misuse of involuntary bankruptcy arises, however, when an involuntary petition, or the threat of filing such a petition, is used to obtain unjust advantage over an alleged debtor. This usually is done in an attempt to collect a disputed debt, although it sometimes is done for other reasons as well. *See, e.g., In re Nordbrock*, 772 F.2d 397, 399 (8th Cir. 1985) (attempt to collect disputed debt); *In re Salmon*, 128 B.R. 313, 315 (Bankr. M.D. Fla. 1991) (petition filed out of animosity); *In re LaClede Cab Co.*, 76 B.R. 687, 693 (Bankr. E.D. Mo. 1987) (attempt to force employer into labor negotiations). The potential for abuse is greatly magnified when the court replaces the involuntary debtor's management with a trustee, permitting the trustee to dismantle or destroy what remains of the debtor's business, while the debtor watches helplessly from the sidelines. *See* 11 U.S.C. § 303(g).

Recognizing the harsh effects of involuntary petitions, and the potential for their abuse, Congress built into the Bankruptcy Code certain protections for debtors in involuntary cases. *In re McMeekin*, 18 B.R. at 178 ("Congress has long required strict criteria for qualification to file and for allowance of involuntary petitions"). Eleven U.S.C. § 303 states that an involuntary petition may be commenced only by three or more entities having an aggregate claimed debt of $5,000. 11 U.S.C. § 303(b)(1); *Basin Elec. Power Cooperative v. Midwest Processing Co.*, 769 F.2d 483, 487 (8th Cir. 1985) ("The three creditor requirement is designed to prevent use of involuntary bankruptcy proceedings by creditors as a means of harassing an honest debtor."), *cert. denied*, 474 U.S. 1083 (1986). More importantly, if the involuntary debtor controverts the petition,

the court must dismiss the petition unless it determines, not only that "the debtor is generally not paying such debtor's debts as such debts become due," but also that the debts are not "the subject of a bona fide dispute." 11 U.S.C. § 303(h)(1); *see also* 11 U.S.C. § 303(b)(1); *Bartmann v. Maverick Tube Corp.*, 853 F.2d 1540, 1543 (10th Cir. 1988) ("a petitioning creditor does not have standing when its debt is subject to a bona fide dispute").

The requirement that there be no bona fide dispute was added by the 1984 amendments to the Bankruptcy Code specifically to prevent alleged creditors from using the bankruptcy courts to threaten or harass alleged debtors into paying disputed claims. *Bartmann*, 853 F.2d at 1543; *In re Nordbrock*, 772 F.2d at 399; *In re Tarasi & Tighe*, 88 B.R. 706, 712 (Bankr. W.D. Pa. 1988).[4] It is not the role of the bankruptcy court to decide such disputes when considering whether to enter an order for relief; only whether such a dispute exists. *Bartmann*, 853 F.2d at 1544. Hence, a colorable defense to a debt requires a court to dismiss an involuntary petition. *In re Tri-County Farm Equip. Co.*, 87 B.R. 667, 671 (D. Kan. 1988); *see In re Nordbrock*, 772 F.2d at 399 (finding bona fide dispute based, in part, on existence of pending civil action involving same claim); *Basin Elec. Power Cooperative v. Midwest Processing Co.*, 769 F.2d at 485 (legitimate contract dispute); *In re Reid*, 773 F.2d at 947 (bona fide dispute whether president commingling corporate funds).

The burden of establishing each of these factors is on the petitioning creditors, not the involuntary debtor. *In re Amburgey*, 68

---

[4] In *In re Busick*, 831 F.2d 745, 749 n.2 (7th Cir. 1987), the court quoted the proponent of the 1984 amendment as stating: "'Some courts have interpreted section 303's language on a debtor's general failure to pay debts as allowing the filing of involuntary petitions and the granting of involuntary relief even when the debtor's reason for not paying is a legitimate and good-faith dispute over his or her liability. This interpretation allows creditors to use the Bankruptcy Code as a club against debtors who have bona fide questions about their liability, but who would rather pay up than suffer the stigma of involuntary bankruptcy proceedings.... I believe this amendment, although a simple one, is necessary to protect the rights of debtors and to prevent misuse of the bankruptcy system as a tool of coercion....' 30 Cong. Rec. S7618 (June 19, 1984) (comments of Senator Baucus)."

B.R. 768, 771 (Bankr. S.D. Ind. 1987). Because of their potentially serious consequences, courts are supposed to scrutinize such petitions carefully. *In re Reid*, 773 F.2d at 946; *In re Cates*, 62 B.R. at 180.

Nevertheless, perhaps the most important debtor protection built into section 303 is the provision allowing for damages if an involuntary petition is dismissed. *See* 11 U.S.C. § 303(i). If the court dismisses a petition under this section other than by the consent of all concerned or waiver by the debtor, the statute expressly allows the court to grant judgment against the petitioners and in favor of the debtor for costs and reasonable attorneys' fees. 11 U.S.C. § 303(i)(1); *In re K.P. Enterprise*, 135 B.R. 174, 176-177 (Bankr. D. Me. 1992) (costs and attorneys' fees may be awarded without finding of bad faith). If the court finds that any petitioner filed the involuntary petition in bad faith, the court may also award "any damages proximately caused by such filing," as well as punitive damages. 11 U.S.C. § 303(i)(2); *In re Salmon*, 128 B.R. 313.[5]

Section 303(i) was inserted in this statute "in recognition of the serious harm inflicted upon alleged debtors when involuntary petitions are wrongfully filed." *In re Reid*, 854 F.2d 156, 159 (7th Cir. 1988); *see In re Salmon*, 128 B.R. at 315 ("Congress clearly created a remedy for malicious prosecution in the form of a bad faith filing of an involuntary petition in bankruptcy"). Without the possibility of liability for a monetary judgment for such behavior, creditors could try to use the involuntary bankruptcy procedure to disrupt or destroy the financial health of other businesses or individuals without fear of serious repercussions if they fail.

Section 303(i) not only provides for compensatory damages, it provides for the possibility of punitive damages as well, if the involuntary petition was filed in bad faith. 11 U.S.C. § 303(i)(2)(B). These punitive damages serve a separate, distinct and important *public* function to punish and deter unlawful conduct. *Camelot, Inc. v. Hayden*, 30 B.R. 409, 411 (E.D. Tenn. 1983); *In re Advance*

---

[5] At least one circuit has held that when an involuntary petition is wrongfully filed, the alleged debtor is not limited to its section 303(i) remedies, but also may assert common law claims, such as malicious prosecution, abuse of process, false representation and intentional interference with business relationships. *Paradise Hotel Corp. v. Bank of Nova Scotia*, 842 F.2d at 52, 53.

Press & Litho, Inc., 46 B.R. at 706. If a debtor is denied the opportunity to challenge a bankruptcy court's erroneous finding that an involuntary petition was filed properly, then not only does the debtor lose, but the public loses as well. *See In re Salmon*, 128 B.R. at 316 ("A bad faith filing goes not only to Salmon's filing of the involuntary petition, but also goes to the utilization of the entire bankruptcy system."); *In re SBA Factors of Miami, Inc.*, 13 B.R. at 101 ("It is also obvious that the use of the bankruptcy court as a routine collection device would quickly paralyze this court").

An involuntary debtor ordinarily has a statutory right to appellate review of bankruptcy court orders. 28 U.S.C. § 158(a) & (d); Fed. R. Bankr. P. 8001(a).[6] When the exercise of that right can be denied on "equitable" mootness grounds based on the extent to which the debtor's business has been destroyed by the filing of the involuntary petition, it becomes that much easier to use involuntary bankruptcy petitions for improper purposes. If the petitioners in such cases can persuade a single bankruptcy judge that their petition has merit, they need not face the two additional levels of appellate review that otherwise are statutorily available to an involuntary debtor who believes it has been wronged. *See* 28 U.S.C. § 158(a) & (d). Not only does this deprive debtors of meaningful appellate rights, but it also encourages others with ulterior purposes to take their chances in bankruptcy court, when otherwise they might not do so.

Because of this, the Ninth Circuit's supposedly "equitable" rationale for mooting bankruptcy appeals, relied upon by the court of appeals in this case and numerous other cases (*see infra.* § II), is

---

[6] The right to appeal is perhaps even more important in the bankruptcy context than in other contexts because it offers the only opportunity to have an Article III court review a disputed issue in a bankruptcy proceeding. *See* 28 U.S.C. § 1334(a) & (b) (district courts have original and exclusive jurisdiction of bankruptcy cases); 28 U.S.C. § 157(b) (bankruptcy court authority to hear cases conditioned upon being subject to review by district court); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (bankruptcy courts are not Article III courts).

in fact inequitable and illegal because it deprives an involuntary debtor of the opportunity to prove that a bankruptcy court's ruling was erroneous, and that the debtor should therefore be made whole, to the extent reasonably possible, by an award of monetary damages.[7] Perhaps most importantly, this doctrine encourages misuse of the bankruptcy system by those who seek to use that system as a tool for improper ends. Congress placed section 303(i) in the involuntary bankruptcy statute for the clear purpose of providing for such recompense and for punishing and deterring such wrongful behavior. The Ninth Circuit's "equitable" mootness doctrine is inconsistent with this mandate.

Neither Hamilton Taft nor any other alleged debtor should be placed involuntarily into a situation where it cannot obtain the appellate review to which it otherwise is entitled because the appellate court has found that equity and finality outweigh that right, including the right ultimately to seek Congressionally mandated monetary relief. To ensure that alleged debtors, and the public in general, are afforded the protection Congress intended for them under 11 U.S.C. § 303, the Court should grant this petition.

B. There Is Disagreement Among the Circuits Whether "Equity," and in Particular "Finality," Can Justify a Mootness Determination, When the Court Can in Fact Grant Effective Relief

Traditionally, an appeal is considered moot when the appellate court is no longer able, for whatever reason, to grant meaningful or effective relief to the appellant. *Mills v. Green*, 159 U.S. 651, 653 (1895). Several federal circuits, however, most notably the Ninth Circuit, have expanded the mootness doctrine significantly in bankruptcy cases to include as moot cases that the court, for supposed equitable reasons, does not think should proceed. These cases have accorded a higher value to "equity," and in particular "finality" of decision, than to availability of effective relief. Several circuits

---

[7] As noted in footnote 3, *supra*, not only did the district court's mootness determination deprive Hamilton Taft of an opportunity to prove the basis for its own damages claim, but that determination also allowed the trustee to obtain a judgment against Hamilton Taft's former owner based on collateral estoppel use of the unreviewed findings of the bankruptcy court.

have now addressed this Ninth Circuit standard and have endorsed or spurned it to varying degrees by the decisions they have rendered. The Fifth Circuit has expressly rejected the Ninth Circuit standard. This Court should address this disagreement among the circuits and clarify this important area of the law.

Mootness has its foundation in the "case or controversy" requirement of Article III of the Constitution. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 602 (1982). This Court has stated:

> Federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies. To satisfy the Article III case-or-controversy requirement, a litigant must have suffered some actual injury that can be redressed by a favorable judicial decision.

Iron Arrow Honor Society v. Heckler, 464 U.S. 67, 70 (1983) (citations omitted); *see* James Wm. Moore, *et al.*, 6A *Moore's Federal Practice* ¶ 57.13 (2d ed. 1993) ("Mootness occurs either when the issues are no longer 'live,' or when the parties lack a legally cognizable interest in the outcome of the litigation. Or as succinctly stated by one court, '[m]ootness results when events occur during the pendency of a litigation which render the court unable to grant the requested relief'" (quoting *Carras v. Williams*, 807 F.2d 1286 (6th Cir. 1986))).

The unavailability of effective or meaningful relief can moot a case in a variety of ways. For example, the defendant can fulfill the obligations urged on it by the complaining party. *Honig v. Students of California School for the Blind*, 471 U.S. 148 (1985). Decisional or statutory law can change while a case is pending, giving the complaining party what it wants. *Hall v. Beals*, 396 U.S. 45 (1969). The parties can settle their dispute. *Stewart v. Southern Railway Co.*, 315 U.S. 283 (1942). Or the plaintiff can abandon or withdraw its action. *Consumers Union of United States v. Kissinger*, 506 F.2d 136 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975).

Most circuits characterize mootness in the bankruptcy context by this same test. *See, e.g., In re Club Associates*, 956 F.2d 1065, 1069 (11th Cir. 1992) ("Central to a finding of mootness is a determination by an appellate court that it cannot grant effective judicial relief."); *In re Sullivan Central Plaza, I, Ltd.*, 914 F.2d 731, 733-34

(5th Cir. 1990) ("The mootness doctrine is grounded primarily and originally in the appellate court's inability to fashion relief."); *In re Cantwell*, 639 F.2d 1050, 1053 (3rd Cir. 1981) ("Generally, an appeal will be dismissed as moot when events occur during the pendency of the appeal which prevent the appellate court from granting any effective relief.").

The Ninth Circuit at times has also evaluated mootness in the bankruptcy context in terms of the availability of effective relief. *See, e.g., In re Carroll*, 903 F.2d 1266, 1270 (9th Cir. 1990) (appeal not moot where, although appellant did not seek a stay of injunctive orders, he also sought money damages that could still be granted); *In re Combined Metals Reduction Co.*, 557 F.2d 179, 194 (9th Cir. 1977) (debtor's appeal not moot where court could surcharge the trustee for losses caused by his breach of trust). However, the Ninth Circuit has adopted a second, and what it considers more important, standard for mootness, which allows "equity" to override the legal right of a debtor to pursue an appeal even where effective relief is available. *See Valley Nat. Bank v. Trustee for Westgate-California Corp.*, 609 F.2d 1274, 1283 (9th Cir. 1979), *cert. denied*, 444 U.S. 1015 (1980); *In re Roberts Farms, Inc.*, 652 F.2d 793, 798 (9th Cir. 1981); *Algeran, Inc. v. Advance Ross Corp.*, 759 F.2d 1421, 1423 (9th Cir. 1985); *In re Onouli-Kona Land Co.*, 846 F.2d 1170, 1172 (9th Cir. 1988).

Hence, in the present case, although the Ninth Circuit acknowledged the "effective relief" test for mootness, it did not premise its mootness finding upon the application of that test. Pet. App. 6a. Instead, the court based its mootness determination upon the second Ninth Circuit test for mootness:

> Second, an appeal may become moot when failure to obtain "a stay of the objectionable orders of the Bankruptcy Court [has] permitted such a comprehensive change of circumstances to occur as to render it inequitable ... to consider the merits of the appeal." *In re Roberts Farms, Inc.*, [652 F.2d 793, 798 (9th Cir. 1981)].... This rule developed in part from "the particular need for finality in orders regarding stays in bankruptcy." *Algeran, Inc. v. Advance Ross Corp.*, 759 F.2d 1421, 1424 (9th Cir. 1985); *see Estate of Richards v. Onouli-Kona Land Co. (In re Onouli-Kona Land Co.)*, 846 F.2d 1170, 1172 (9th

> Cir. 1988) ("Finality in bankruptcy has become the dominant rationale for our [mootness] decisions....").

Pet. App. at 6a. Based on this test, the Ninth Circuit affirmed the district court's mootness decision, not because the district court *could* not fashion effective relief, but because the district court, for "equitable" reasons, *would* not fashion such relief. Pet. App. 5a, 6a.

This "equitable" mootness doctrine is based primarily, as the Ninth Circuit has made clear, on the value of "finality;" hence, Ninth Circuit decisions have stressed the importance of obtaining a stay to prevent the transaction from becoming "final." *Algeran, Inc. v. Advance Ross Corp.*, 759 F.2d at 1424. But most opinions in the bankruptcy context that have rendered decisions in favor of finality have done so in cases involving the sale of property by a bankruptcy trustee. Under such circumstances, the express language of the Bankruptcy Code denies an appellant the right to recover the property if the sale has been made in good faith and a stay was not obtained. 11 U.S.C. § 363(m);[8] *see, e.g., United States v. Salerno*, 932 F.2d 117, 122-23 (2d Cir. 1991); *In re Mann*, 907 F.2d 923 (9th Cir. 1990); *In re Gilchrist*, 891 F.2d 559 (5th Cir. 1990); *In re Stadium Management Corp*, 895 F.2d 845 (1st Cir. 1990); *In re Sax*, 796 F.2d 994 (7th Cir. 1986). Here, Congress has expressed a clear intent to encourage good faith property sales in the bankruptcy context and to protect third parties from the uncertainty they would otherwise have if their transactions could be undone at some later date following an appeal. The debtor therefore must obtain a stay or forego the right to recover the property on appeal. *Ibid.*

As this statute, and the cases following it, recognize, finality has obvious value when dealing with the transfer of property to third parties, where the debtor is seeking through litigation to regain possession of that property or otherwise affect the sale. Unless the

---

[8] Eleven U.S.C. § 363(m) states: "The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal."

transaction is stayed, third parties' interests may be adversely affected.

Where, as here, however, the debtor is not seeking to regain possession of the property from the buyer, or in any other way influence transactions that already have occurred, but rather merely seeks monetary damages from parties to the action who wrongfully put the debtor in bankruptcy, finality generally is not important or even relevant. *See, e.g., In re Sullivan Central Plaza, I, Ltd.*, 914 F.2d at 733 n.6 ("The mootness rule does not prevent the hearing of an appeal where *monetary* relief is sought." (emphasis in original)); *In re Combined Metals Reduction Co.*, 557 F.2d at 194 (court could surcharge trustee for losses caused by his breach of trust). Most importantly, Congress has not extended the mootness doctrine beyond attempted revocation of trustees' sales of property, while it has *expressly* provided a monetary remedy for wrongfully filed involuntary petitions, as well as the right to appeal adverse bankruptcy court orders in pursuit of that remedy. 11 U.S.C. § 303(i); 28 U.S.C. § 158(a) & (d); Fed. R. Bankr. P. 8001(a).

Presumably for these reasons, the Fifth Circuit has expressly disagreed with the Ninth Circuit that finality should be a dominant consideration in determining mootness:

> We note that some circuits stress finality concerns over the lack of available relief as the primary underpinning for the mootness doctrine. *See, e.g., In re Onouli-Kona Land Co.*, 846 F.2d 1170, 1172-73 (9th Cir. 1988). With this, we disagree.

In re Sullivan Central Plaza, I, Ltd., 914 F.2d at 734 n.7. The *Sullivan* court acknowledged a public interest in "expediting and finalizing bankruptcy sales," but explained that "[i]n most cases the court's inability to fashion relief will protect the public's interest." *Id.* at 734. Where the court can provide such relief, however — such as where there is a monetary remedy available against a party to the action — the case is not moot. *Id.* at 733 n.6.

The Second Circuit, on the other hand, has recently applied the Ninth Circuit's "equity" test to dismiss a case because the appellant "made no effort to obtain a stay and ... permitted 'such a comprehensive change of circumstances to occur as to render it inequitable' for the appellate court to reach the merits of the appeal."

In re Chateaugay Corp., No. 92-5056, 1993 U.S. App. LEXIS 4407, at *12 (2d Cir. March 9, 1993). Other circuits, while suggesting that equity, and in particular finality, have relevance to determining when requested relief would be "effective" (usually citing Ninth Circuit authority) have nevertheless focused their analysis on whether they reasonably could provide the relief requested by the appellant, often finding that the case is not in fact moot. *See, e.g., Raymark Industries, Inc. v. Lai*, 973 F.2d 1125, 1129 (3rd Cir. 1992) (appeal not moot because "a reversal would allow the appellant to seek either a money judgment or return of the funds or property seized in execution"); *In re Andreuccetti*, 975 F.2d 413, 418-19 (7th Cir. 1992) (appeal not moot because, "[a]lthough a portion of the reorganization plan appears to have been completed, other aspects of it may remain undone"); *Miami Center Ltd. Partnership v. Bank of New York*, 838 F.2d 1547, 1556-57 (11th Cir. 1988) (case moot because "[g]ranting the remedies the debtors seek would 'create an unmanageable, uncontrollable situation for the Bankruptcy Court'"), *cert. denied*, 488 U.S. 823 (1988); *In re AOV Industries, Inc.*, 792 F.2d 1140, 1148-49 (D.C. Cir. 1986) (case not moot to the extent claims affect only parties to lawsuit).

Even cases giving finality of judgment substantial weight in a mootness determination have denied that a party must secure a stay pending appeal to avoid mootness. *In re AOV Industries, Inc.*, 792 F.2d at 1147; *In re Club Associates*, 956 F.2d at 1070 n.13. As in this case, there are various reasons why a debtor might not seek a stay. For example, the bonding requirements might be unmanageable. Or the improper institution of the involuntary bankruptcy proceedings itself might have rendered the debtor unable to resume operations, leaving a damages award as the only effective remedy. *See In re R. Eric Peterson Constr. Co.*, 951 F.2d at 1177 (noting "disastrous effect on [debtor's] financial health" caused by filing of involuntary petition); *Paradise Hotel Corp. v. Bank of Nova Scotia*, 842 F.2d at 48 (involuntary petition "immediately created a crisis in relations between [debtor] and its other creditors").

Overemphasizing finality to deny a debtor its appellate rights is especially insidious in the context of involuntary proceedings, where the debtor cannot even be said to have sought the protection of the bankruptcy courts. *In re McMeekin*, 18 B.R. at 177 ("unlike the situation surrounding a voluntary petition, an involuntary debtor may have no need of the extreme remedy of bankruptcy, yet he or she may be unwillingly saddled with the harsh effects it may cause").

This case is a perfect example of the pernicious consequences of such a doctrine.

The bankruptcy court here summarily rejected Hamilton Taft's contentions that as of the time the involuntary petition was filed Hamilton Taft was paying all of its debts and that the petitioners' alleged debts were the subject of a bona fide dispute concerning the proper interpretation of the parties' service contracts. If Hamilton Taft's arguments were correct, however, then the petition was improperly filed and Hamilton Taft should have obtained a dismissal of the petition, along with attorneys' fees and costs incurred in obtaining that dismissal. If, as Hamilton Taft further contends, the petitioning creditors knew that they had a bona fide dispute with Hamilton Taft when they filed their petition — as is evidenced by their prior district court lawsuits — then they filed the petition in bad faith, and Hamilton Taft should be permitted to seek compensatory damages for the destruction of its business, as well as punitive damages to punish the petitioning creditors and deter such behavior by others in the future. Hamilton Taft desired, and deserved, to have its arguments reviewed by an appellate court. Nevertheless, by invoking the "equitable" mootness test, the district court refused even to consider arguments that established the basis for a claim for effective monetary relief.

Because of the pernicious effects that this "equitable" mootness doctrine can have on the bankruptcy system and the parties involuntarily subjected to it — as is evidenced by the facts of this case — and because the various circuits are in disagreement regarding the weight to be given "equity" and "finality" in mootness determinations, this Court should grant the requested writ.

CONCLUSION

The Court should grant this petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

JACK T. FRIEDMAN
DAVID M. RICE*
CARROLL, BURDICK & McDONOUGH
44 Montgomery Street, Suite 400
San Francisco, CA 94104
Telephone: (415) 989-5900
Attorneys For Hamilton Taft & Company

April 26, 1993

*Counsel of Record

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NO. 92-15689
DC NO. CV-91-03518-JPV
BC NO. 91-3-1077-LK

In re: HAMILTON TAFT & COMPANY, a California corporation,

Debtor,

HAMILTON TAFT & COMPANY, a California corporation,

Debtor-Appellant,

v.

FEDERAL EXPRESS; STANFORD UNIVERSITY; STANFORD UNIVERSITY HOSPITAL; FREDERICK S. WYLE, TRUSTEE FOR HAMILTON TRUST & COMPANY,

Creditors-Appellees.

Appeal from the United States District Court
for the Northern District of California
John P. Vukasin, Jr., District Judge, Presiding

Submitted October 5, 1992*
San Francisco, California
Filed January 25, 1993

---

* The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

MEMORANDUM**

Before: TANG, PREGERSON and ALARCON, Circuit Judges.

Involuntary Chapter 11 Debtor-Appellant Hamilton Taft & Company (Hamilton) appeals from the district court's order dismissing its appeals of four separate bankruptcy court orders. Hamilton appealed from an order authorizing appointment of a trustee, an order appointing Frederick S. Wyle as its Trustee, an order closing down its business, and an order for relief. The district court dismissed the appeals as moot due to the unavailability of effective relief and lack of equity caused by Hamilton's failure to obtain a stay. Hamilton contends the district court erred because Hamilton has an effective remedy in its right to seek damages and disgorgement of fees from its creditors for wrongfully placing it in bankruptcy. Hamilton also contends the bankruptcy court erred in appointing a trustee, authorizing the shutdown of its business, and granting relief.

I.

Hamilton was a payroll service company that annually transmitted between $3 billion to $4 billion of payroll tax payments to tax authorities for over 250 clients. Appellees Federal Express, Stanford University Hospital, and Stanford University Board of Trustees, along with other creditors, entered into separate tax service agreements with Hamilton. The appellees periodically transferred payroll taxes to Hamilton for remission to the appropriate taxing authorities. Hamilton generally received no fees for providing this service; instead, under Hamilton's written service agreement, clients compensated Hamilton by allowing it to take advantage of the "float" — the time value of money in Hamilton's possession before transfer to the taxing authorities.

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

In March 1991, appellees discovered that at least $34 million they had sent to Hamilton was not forwarded timely to the taxing agencies and that substantial tax penalties were owed.

Appellees filed an involuntary bankruptcy petition against Hamilton on March 20, 1991. Appellees also filed a motion to appoint a trustee. On March 26, 1991, the bankruptcy judge entered an order appointing a trustee and an order specifically appointing Appellee Frederick S. Wyle as Trustee. On May 17, 1991, the bankruptcy court authorized the Trustee to close down Hamilton's business. On May 28, 1991, the Trustee filed his First Interim Report, describing the preliminary results of his investigation into Hamilton's affairs.

The Trustee concluded that $55.2 million, net of repayments, had been transferred from Hamilton to entities controlled by Hamilton's president, Connie C. Armstrong, Jr., during the two-year period Armstrong owned Hamilton. The Trustee found the money had been used for a combination of 1) speculative ventures and investments in Texas, many of which are defunct and none of which had produced any profit, 2) funding the operations of the Armstrong companies, and 3) personal luxuries for Armstrong, including a "hobby" cattle ranch, costing an estimated $10 million. According to the Trustee, Hamilton owed at least $90.9 million in unpaid taxes to its clients, resulting principally from Armstrong's diversion of payroll tax deposits. Hamilton had $5.8 million available to meet these liabilities.

On May 31, 1991, on a motion for summary judgment by the appellees, the bankruptcy court issued an order of relief.

Subsequently, four other companies controlled by Armstrong (Texas Debtors) filed bankruptcy in Texas.

Because Hamilton did not seek a stay, the Trustee took control of the business. Between the time of the issuance of the bankruptcy court's orders and the district court's hearing of Hamilton's appeal, the Trustee:

1) shut down Hamilton's business;

2) filed an adversary proceeding in the Hamilton bankruptcy case against Armstrong and every entity controlled by him of

which the Trustee had knowledge, seeking recovery of assets fraudulently conveyed from Hamilton Taft, *Frederick S. Wyle v. Connie C. Armstrong, Jr., et al.*, Adv. Proc. No. 91-3-081-LK;

3) filed a motion for change of venue in order to transfer the Chapter 11 cases of the four Texas Debtors to San Francisco. The bankruptcy court granted the motion. Subsequently, the four Texas Debtors stipulated that their cases would be jointly administered with the Hamilton case;

4) sought and won the substantive consolidation of the Texas Debtors and Hamilton. None of the debtors, including Hamilton, opposed the substantive consolidation or the appointment of the Trustee as Trustee of the consolidated estate;

5) was granted authorization to sell, among other numerous sale transactions, several town houses, Hamilton's office equipment and furniture, luxury vehicles, cattle, horses, and other personal property. The Trustee also took title to Armstrong's cattle ranch.

The district court found that as a result of the substantive consolidation and other actions, the assets of the Texas Debtors are now under the control of the Trustee.

Since the Trustee was appointed, court orders have been issued by the bankruptcy court authorizing or approving the Trustee's transactions as Trustee of Hamilton and the Texas Debtors. These orders cover a variety of activities, including sales of assets, contracts with third parties, abandonment of assets, employment of professionals and other consultants, and the operations of Hamilton and the Texas Debtors.

The district court held Hamilton's appeals moot on two separate and independent grounds. First, the district court held that the actions taken by the Trustee had created a substantial change in circumstances that made it impossible for the district court to fashion relief. Second, the district court held that by failing to seek a stay and permitting the substantial changes in circumstances to occur, Hamilton had allowed the appeals to become moot for lack of equity. Hamilton timely filed a notice of appeal to this court. We review the district court's determination of mootness *de novo*. *Williams v. United States Gen. Services Admin.*, 905 F.2d 308, 310 (9th Cir. 1990).

II.

Hamilton argues the district court erred in dismissing its appeals as moot because the court could have granted effective and equitable relief by returning control of the business to Hamilton, discharging the wrongfully appointed Trustee, and dismissing the bankruptcy petition. These actions would have cleared the way for a damage suit against appellees under 11 U.S.C. § 303(i) (authorizing recovery for wrongful bankruptcy filing). Hamilton admits it never sought a stay, but argues the appeals are not moot because a stay was unnecessary to preserve Hamilton's rights.

We cannot agree. Although Hamilton partially grounds its argument against mootness on its plan to sue appellees for damages at some later time, before this court it seeks removal of the trustee and dismissal of the petition for involuntary bankruptcy. These are equitable remedies. Equitable remedies in bankruptcy proceedings are unavailable to appellants who fail to seek a stay of the bankruptcy court's objectionable orders, permitting a comprehensive change of circumstances to occur. *Trone v. Roberts Farms, Inc. (In re Roberts Farms, Inc.)*, 652 F.2d 793, 798 (9th Cir. 1981).

In bankruptcy cases, an appeal may become moot in one of two ways. First, events may occur that make it impossible for the appellate court to fashion effective relief. *Bennett v. Gemmill (In re Combined Metals Reduction Co.)*, 557 F.2d 179, 187 (9th Cir. 1977). Thus, when a trustee has already sold assets to third parties, a court may be powerless "to undo what has already been done." *Id.* No live controversy exists, and the court is "depriv[ed] . . . of its constitutional jurisdiction over the matter." *In re Texaco*, 92 B.R. 38, 45 (S.D.N.Y. 1988).

Second, an appeal may become moot when failure to obtain "a stay of the objectionable orders of the Bankruptcy Court [has] permitted such a comprehensive change of circumstances to occur as to render it inequitable . . . to consider the merits of the appeal." *In re Roberts Farms, Inc.*, 652 F.2d at 798. When, for example, an appellant fails to seek a stay of the order confirming the plan of reorganization and allows the trustee to conduct a series of complex transactions involving the estate, a court may dismiss the appeal for "lack of equity." *Id.* at 797, 798. This rule developed in part from "the particular need for finality in orders regarding stays in bankruptcy." *Algeran, Inc. v. Advance Ross Corp.*, 759 F.2d 1421, 1424

(9th Cir. 1985); *see Estate of Richards v. Onouli-Kona Land Co. (In re Onouli-Kona Land Co.)*, 846 F.2d 1170, 1172 (9th Cir. 1988) ("Finality in bankruptcy has become the dominant rationale for our [mootness] decisions . . . .").

Thus, Hamilton's arguments, which focus almost entirely on the feasibility of effective relief, are largely beside the point. The district court held not only that it could not fashion relief, but that it *would* not. The court concluded that the comprehensive change of circumstances permitted by Hamilton's failure to seek a stay made judicial action inequitable. *Valley Nat. Bank of Ariz. v. Trustee*, 609 F.2d 1274, 1283 (9th Cir. 1979); *cert. denied*, 444 U.S. 1015 (1980), is "the touchstone precedent for this principle." *In re Roberts Farms, Inc.*, 652 F.2d at 798. In *Valley National*, appellants, minority shareholders and the debtor, challenged a merger sought by the trustees under Chapter X of the Bankruptcy Act. The minority shareholders never sought a stay and the merger took place. After holding that fashioning an equitable remedy would be nearly impossible, the court also held that the minority shareholders

> would not be entitled to equitable relief *even if it were available*. Neither of them sought any kind of stay of the order . . . . This court stated in *Matter of Combined Metals [Reduction Co.*, 557 F.2d 179 (9th Cir. 1977)]: "the practical necessities involved in a successful reorganization require that unless an order of the bankruptcy judge or the district judge is stayed pending appeal, the trustee's acts in accordance with the order should not thereafter be subject to reversal, even if the order is subsequently overturned on appeal." [*Id.*] at 189. This failure to obtain, or even seek, a stay effectively precludes [appellants] from the equitable remedy they ask for; absent a stay, it was entirely proper for the trustees to go ahead with the merger. The actions they took pursuant to that order should not be reversed.

Valley Nat. Bank of Ariz., 609 F.2d at 1283 (emphasis added) (citation omitted). Hamilton seems to address the rule of *Valley National* only by urging that equity strongly favors appellate consideration of the issues it raises because, if Hamilton is right, "equity cries out" that it should have an opportunity to seek recompense. This argument is unpersuasive, given the facts of the case. Not only

has Hamilton lost its claim to an equitable remedy by failing to seek a stay, but the maxim "he who comes into equity must come with clean hands" applies here with particular force. The judgment of the district court is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C91-3518-JPV

In Re: HAMILTON TAFT & COMPANY,
a California corporation,

Debtor.

ORDER GRANTING PETITIONERS' AND TRUSTEE'S MOTION TO DISMISS AND DENYING DEBTOR'S MOTION TO STRIKE

[Filed March 6, 1992]

Federal Express Corporation, Stanford University Hospital, the Board of Trustees of the Leland Stanford Junior University (collectively referred to as the "Petitioners") and Frederick S. Wyle (the "Trustee"), the trustee for Hamilton Taft & Company ("Hamilton Taft"), filed motions to dismiss Hamilton Taft's appeals from four different bankruptcy court orders. Hamilton Taft appealed the following orders of the bankruptcy court: (1) Order re: Appointment of Trustee (District Court no. C91-3518); (2) Order re: Appointment of Frederick S. Wyle as Trustee (District Court no. C91-3519); (3) Order re: Closing Down of Hamilton Taft's Business (District Court no. C91-3936); and (4) Order re: Order for Relief (District Court no. C91-3939). The motions to dismiss were heard on February 13, 1992.

On February 13, 1992, this Court also heard arguments on Hamilton Taft's motion to strike certain portions of Frederick S. Wyle's Declaration, submitted in support of the Petitioners' motion to dismiss.

Appearing for the Petitioners were Michael H. Ahrens of Bronson, Bronson & McKinnon on behalf of Federal Express Corporation and Randy Michelson of McCutchen, Doyle, Brown & Enerson on behalf of The Board of Trustees of The Stanford Junior University and Stanford University Hospital. Appearing for the

Trustee was Patricia S. Mar of Feldman, Waldman & Kline. Appearing for Hamilton Taft were Mark E. MacDonald of Johnson & Gibbs and Lawrence A. Callaghan of Long & Levit.

In accordance with the Findings of Fact and Conclusions of Law entered herein, the Court having found that there has been a substantial change in circumstances since the filing of the bankruptcy petition and that Hamilton Taft failed to diligently pursue their available remedies to obtain a stay pending appeal, due and proper notice of the motions have been given, and good cause appearing, it is ORDERED that:

1. The Petitioners' and Trustee's motions to dismiss the four appeals filed by Hamilton Taft are hereby GRANTED and the four appeals are hereby DISMISSED; and

2. Hamilton Taft's motion to strike certain portions of the Trustee's Declaration is hereby DENIED.

Date: MAR -6 1992

/s/
THE HONORABLE JOHN P. VUKASIN
United States District Court Judge

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C91-3518-JPV

In Re: HAMILTON TAFT & COMPANY,
a California corporation,

Debtor.

FINDINGS OF FACT AND CONCLUSIONS OF LAW
RE PETITIONERS' AND TRUSTEE'S
MOTION TO DISMISS AND
HAMILTON TAFT'S MOTION TO STRIKE

[Filed March 6, 1992]

On February 13, 1992, this Court heard argument on the motions of Federal Express Corporation, Stanford University Hospital, the Board of Trustees of the Leland Stanford Junior University (collectively referred to as the "Petitioners") and Frederick S. Wyle (the "Trustee"), the trustee for Hamilton Taft & Company ("Hamilton Taft"), to dismiss Hamilton Taft's appeals from four different bankruptcy court orders. Hamilton Taft appealed the following orders: (1) Order re: Appointment of Trustee (District Court no. C91-3518); (2) Order re: Appointment of Frederick S. Wyle as Trustee (District Court no. C91-3519); (3) Order re: Closing Down of Hamilton Taft's Business (District Court no. C91-3936); and (4) Order re: Order for Relief (District Court no. C91-3939).

On February 13, 1992, this Court also heard arguments on Hamilton Taft's motion to strike certain portions of Frederick S. Wyle's Declaration, submitted in support of the Petitioners' motions to dismiss.

Appearing for the Petitioners were Michael H. Ahrens of Bronson, Bronson & McKinnon on behalf of Federal Express Corporation and Randy Michelson of McCutchen, Doyle, Brown & Enerson on behalf of The Board of Trustees of The Stanford Junior University and Stanford University Hospital. Appearing for the

Trustee was Patricia S. Mar of Feldman, Waldman & Kline. Appearing for Hamilton Taft were Mark E. MacDonald of Johnson & Gibbs and Lawrence A. Callaghan of Long & Levit.

Having considered the papers submitted and the arguments of counsel, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The Petitioners, along with numerous other creditors, entered into separate tax service agreements (the "tax service agreements") with Hamilton Taft, a payroll tax service company. Under the tax service agreements, the Petitioners periodically transferred employee payroll taxes to Hamilton Taft for timely remission to the appropriate taxing authorities. In exchange for performing this service, Hamilton Taft generally received service fees and/or benefits accruing from the use of these tax funds from the time of receipt until the time tax payments were due.

2. In March 1991, the Petitioners discovered that at least $34 million they had sent to Hamilton Taft was not forwarded timely to the taxing agencies and that substantial penalties were owed. Due to this loss, the Petitioners filed an involuntary bankruptcy petition against Hamilton Taft on March 20, 1991.

3. Also on March 20, 1991, Petitioners filed a motion to appoint a trustee. On March 26, 1991, the Honorable Lloyd King, United States Bankruptcy Court Judge, entered an order appointing a trustee and specifically appointing Frederick S. Wyle as trustee. On May 31, 1991, on a motion for summary judgment by the Petitioners, an order for relief was entered. Hamilton Taft appealed these orders, but did not seek a stay pending appeal.

4. Subsequently, certain related entities of Hamilton Taft filed bankruptcy in Texas, including Knightsbridge Co., Inc. ("Knightsbridge"), Remington Company ("Remington"), Dresdner Petroleum, Inc. ("Dresdner Petroleum") and Dresdner Enterprises, Inc. ("Dresdner Enterprises") (collectively referred to as the "Texas Debtors").

5. After the Trustee was appointed, and as no stay pending appeal was requested by Hamilton Taft, the Trustee took control of the business and took the following actions:

a. On May 17, 1991, the Trustee was authorized to close down the business. Pursuant to the Bankruptcy Court's authorization, the Trustee proceeded with an orderly shut down of Hamilton Taft's business over a period of several months. The closing of the business is now complete.

b. The Trustee filed an adversary proceeding in the Hamilton Taft bankruptcy case, *Frederick S. Wyle v. Connie C. Armstrong, Jr., et al.*, Adv. Proc. No. 91-3-081-LK, against Connie C. Armstrong, Jr. ("Armstrong"), former president of Hamilton Taft, and every entity controlled by him of which the Trustee had knowledge, seeking recovery of assets fraudulently conveyed from Hamilton Taft. On April 4, 1991, following a hearing, the Bankruptcy Court issued a temporary restraining order prohibiting any transfers and encumbrances by any of the defendants "except to meet day to day ordinary operating expenses." A preliminary injunction was entered by stipulation against Armstrong on July 22, 1991, and against several Armstrong entities on November 4, 1991.

c. On June 7, 1991, the Bankruptcy Court in San Francisco granted the Trustee's motion for change of venue and ordered the Chapter 11 cases of the four Texas Debtors transferred to San Francisco. Subsequently, on July 22, 1991, the four Texas Debtors stipulated that their cases would be jointly administered with the Hamilton Taft case and that Frederick S. Wyle would be appointed interim Trustee of the four debtors, pending determination of a motion for substantive consolidation. Since July 22, 1991, the Trustee has been interim, then permanent, Trustee of Knightsbridge, Remington, Dresdner Petroleum and Dresdner Enterprises, and has had control over their operations, assets and affairs.

d. On November 4, 1991, the Trustee sought and the Bankruptcy Court ordered the substantive consolidation of Hamilton Taft, Knightsbridge, Remington, and Dresdner Enterprises. None of the Debtors, including Hamilton Taft, opposed the substantive consolidation or the appointment of the Trustee. Pursuant to substantive consolidation, all of the assets and liabilities of Hamilton Taft, Knightsbridge, Remington, and Dresdner Enterprises were

consolidated, and the Trustee of Hamilton Taft became the Trustee of the consolidated estate. The Trustee was also appointed the permanent trustee of Dresdner Petroleum.

e. The Trustee was authorized to sell, among other numerous sale transactions, several townhouses, Hamilton Taft's office equipment and furniture, office equipment and furniture of Remington, luxury vehicles (Rolls Royce, Jaguar and two Lincoln stretch limousines), cattle, horses and other personal property. The Trustee also took title to the Double C Ranch, formerly owned by Armstrong, including the livestock, ranch equipment, vehicles and other personal property at the ranch. This ranch was transferred in September to the Hamilton Taft estate in lieu of foreclosure. The Trustee subsequently terminated the ranch operations. Additionally, the Trustee closed the Remington office in Dallas and consolidated Remington's office and accounting functions with those of Hamilton Taft's in San Francisco.

6. The result of substantive consolidation and other actions has been that the assets of the Texas Debtors are now under the control of the same Trustee as Hamilton Taft. The assets held by the Texas Debtors include three real estate projects, oil and gas leasehold interests, interests in other business enterprises, and promissory notes for which there are potential recoveries from third parties.

7. Since the Trustee was appointed, court orders have been issued by the Bankruptcy Court authorizing or approving the Trustee's transactions as Trustee of Hamilton Taft and the Texas Debtors. These orders cover a variety of activities, such as sales of assets, contracts with third parties, abandonment of assets, employment of professionals and other consultants, and operations of the debtors.

8. To the extent that these findings of fact are conclusions of law, they are deemed conclusions of law.

CONCLUSIONS OF LAW

A. Motion to Dismiss Appeals as Moot

1. An appeal is dismissed as moot when a substantial change in circumstances occurs which prevents the appellate court from granting any effective relief. *Matter of Combined Metals Reduction Co.*, 557 F.7 179, 187 (9th Cir. 1977). This principle

applies in the context of bankruptcy court appeals. *In re Roberts Farms, Inc.*, 652 F.2d 793, 796-798 (9th Cir. 1981).

2. An entirely separate and independent ground for dismissal exists where appellants have failed and neglected diligently to pursue their available remedies to obtain a stay of the objectionable orders of the bankruptcy court. *In re Roberts Farms, Inc.*, 652 F.2d 793, 796-798 (9th Cir. 1981).

3. Hamilton Taft argues that the mootness doctrine does not apply in this case as effective relief can be given. Hamilton Taft argues that this court can reinstate control of Hamilton Taft in Hamilton Taft and allow Hamilton Taft to pursue damage claims against the Petitioners for instituting the involuntary proceedings and allegedly wrongfully ceasing performance under the parties' written agreement and possibly claims against the Trustee.

4. The actions taken by the Trustee, including the substantive consolidation of Hamilton Taft's case with other bankruptcy cases, the filing by the Trustee of adversary proceedings, the sale of assets to third parties and the closing down of Hamilton Taft's operations, have created a substantial change in the circumstances which renders it inequitable for this Court to consider the merits of the appeals.

5. By failing to seek a stay and permitting these substantial changes in circumstances to occur, Hamilton Taft has allowed these appeals to become moot. For this reason, and the reasons stated above, the four Hamilton Taft appeals are hereby dismissed as moot.

B. Motion to Strike.

1. Local Rule 220-7 of the Local Rules of the United States District Court for the Northern District of California states that declarations shall conform as closely as possible to Federal Rule of Civil Procedure 56(e). Rule 56(e) provides that "affidavits shall be made on personal knowledge, shall set forth facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

2. All relevant evidence is admissible. Federal Rule of Evidence 402.

3. All of the information contained in the Trustee's Declaration is relevant and admissible.

4. To the extent that these conclusions of law are findings of fact, they are deemed findings of fact.

Date: MAR -6 1992

/s/
THE HONORABLE JOHN P. VUKASIN
United States District Court Judge

APPENDIX D

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT CALIFORNIA

No. 91 3 1077 LK

Chapter 11

In Re: HAMILTON TAFT & COMPANY,
a California corporation,

Debtor.

ORDER RE APPOINTMENT OF TRUSTEE

[Filed Mar. 26, 1991]

The motions of the Board of Trustee of The Leland Stanford Junior University, Stanford University Hospital and Federal Express Corporation (collectively, "Petitioners") for appointment of trustee duly came on for hearing on March 26, 1991, and due notice of the hearing having been given, and upon the evidence presented and the arguments of counsel, and in accordance with the Court's oral findings of fact and conclusions of law, it is:

ORDERED that the United States Trustee, after consultation with Petitioners and other parties in interest herein, shall appoint a disinterested person as trustee of the above-named debtor, to take possession of the property of the debtor, to operate the debtor's business, and to perform the duties of a trustee under section 1106(a) of the Bankruptcy Code.

Date: March 26, 1991 at 11:25 a.m.

/s/ [Lloyd King]
United States Bankruptcy Judge

APPENDIX E

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

No. 91 3 1077 LK

Chapter 11

In Re: HAMILTON TAFT & COMPANY,

Debtor.

APPLICATION FOR ORDER APPROVING
APPOINTMENT OF TRUSTEE AND ORDER THEREON

[Filed Mar. 26, 1991]

TO THE HONORABLE LLOYD KING, UNITED STATES BANKRUPTCY JUDGE:

The United States Trustee for the Northern District of California respectfully reports to this Court that, under 11 U.S.C. Section 1104(c) and Section 322(b)(2), the United States Trustee has consulted with parties-in-interest in this Chapter 11 case and subject to Court approval, Frederick Wyle of 235 Montgomery Street #2500, San Francisco, California 94104 (415) 788-0781, has been appointed trustee in the above-captioned case.

The appointed trustee is to serve under his bond in the amount of $1,000,000.00, the original of which is to be filed with the Court and a copy of which is to be provided to the Office of the United States Trustee.

The undersigned represents to the Court that said person is disinterested and is competent to undertake responsibilities of a trustee in this matter, and hereby requests that said appointment be approved and that the trustee shall have all the powers of a trustee

under 11 U.S.C. 1106(a) and authority to operate the debtor's business pursuant to 11 U.S.C. Section 1108.

Dated: March 26, 1991

/s/
Anthony G. Sousa
United States Trustee

IT IS SO ORDERED.

Dated: MAR 26 1991

/s/
Lloyd King
United States Bankruptcy Judge

APPENDIX F

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

No. 91-3-1077 LK

Involuntary Chapter 11

In Re: HAMILTON TAFT & COMPANY,

Debtor.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

[Filed April 17, 1991]

INTRODUCTION

This is a contested involuntary Chapter 11 bankruptcy. The creditors' petition was filed on March 20, 1991. The alleged debtor, Hamilton Taft & Company, filed an answer and counterclaim on March 25, 1991. These findings of fact and conclusions of law concern motions for the appointment of a reorganization trustee. The motions were heard on March 26, 1991.

Appearing for the moving parties were Michael H. Ahrens, Esq. and Margaret H. McGee, Esq. of Bronson, Bronson & McKinnon on behalf of Federal Express Corporation; Randy Michelson, Esq. of McCutchen, Doyle, Brown & Enerson and Susan K. Hoerger, Esq. of Stanford University on behalf of The Board of Trustees of the Leland Stanford Junior University and Stanford University Hospital. Appearing for the debtor were Mark E. MacDonald, Esq. of Johnson & Gibbs and Lawrence A. Callaghan, Esq. of Long and Levit. Also appearing were Laurence F. Pulgram of Howard, Rice, Nemerovski, Canady, Robertson & Falk on behalf of America West Airlines, Inc., The Kendall Company and Blue Cross and Blue Shield of Texas, Inc.; John T. Hansen, Esq. of Thelen, Marrin, Johnson & Bridges on behalf of BW/IP International, Inc., COVIA Partnership, Diamond Walnut Growers, Inc., Genstar Stone Products Company, SCM Chemical, SCM Metals,

Springfield Sugar & Products Co., Sun-Maid Growers of California, Sunsweet Growers, Inc. Valley Fig Growers, and William Marsh Rice University; Daniel J. Bergeson, Esq., Bergeson & Eliopoulos, on behalf of Verbatim Corporation; Jed E. Solomon of Cooper, White & Cooper, on behalf of The Chronicle Publishing Company; Denise M. Amantea, Esq. of Wilson, Sonsini, Goodrich & Rosati, on behalf of R.R. Donnelley & Sons Company and Rochester Institute of Technology; Susan C. Cagann, Esq. of Latham & Watkins on behalf of S & S Credit Co., Inc.; and Daniel Johnson, Jr. of Cooley, Godward, Castro, Huddleson & Tatum, on behalf of Tandem Computers Incorporated and Electric Power Research Institute.

The following entities joined in the motions for appointment of a trustee: America West Airlines, Inc., The Kendall Company, Blue Cross & Blue Shield of Texas, Inc., The Chronicle Publishing Company, R.R. Donnelley & Sons Company, S & S Credit Co., Inc., Tandem Computers Incorporated, Verbatim Corporation and Scott Paper Company.

Having considered the papers submitted and the arguments of counsel, the court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Hamilton Taft & Company (Hamilton Taft) was engaged in the business of providing payroll and payroll tax services. Its customers included the entities listed in the introduction above. The total payroll which was processed annually is estimated to be between three billion and four billion dollars.

2. Before payment of payroll and payroll taxes were due, customers of Hamilton Taft would deliver to Hamilton Taft the sums sufficient to cover payroll, as well as Federal, State and local payroll taxes.

3. Pursuant to written contracts with its customers, Hamilton Taft agreed to make timely payment of payroll and payroll taxes.

4. Hamilton Taft failed to make timely payment of payroll taxes for many of its customers. As a result of this failure on the part of Hamilton Taft, its customers now have very large obligations

to payroll tax authorities for unpaid taxes. In addition, the customers face claims by the taxing authorities for penalties and interest.

5. The contracts between Hamilton Taft and its customers authorized Hamilton Taft to use the funds intended for its customers' payroll and payroll taxes, for its own benefit. This benefit would be interest earned during the short period between Hamilton Taft's receipt of funds from its customers and the dates when payroll and tax payments were due. In jargon terminology, Hamilton Taft could take advantage of the "float."

6. The cumulative tax, penalty, and interest claims against the customers are estimated to be in the tens of millions of dollars. There is an almost complete lack of customer confidence in the ability of Hamilton Taft to continue to process the customers' payroll and payroll taxes.

7. Efforts of Hamilton Taft to restore customer confidence by the employment of new professional advisors have not been successful.

CONCLUSIONS OF LAW

1. Section 1104(a) of the Bankruptcy Code specifically authorizes the appointment of a trustee after the commencement of a reorganization case.

2. The only prospect for restored confidence in and successful reorganization of Hamilton Taft is placing an independent trustee in control of its property and business operations.

3. The appointment of a Chapter 11 trustee meets the standards prescribed in Bankruptcy Code Section 1104(a)(1) and (2). Pursuant to Section 1104(a)(1) "cause" exists in that current management is incompetent and has grossly mismanaged the affairs of the debtor. "Cause" also exists pursuant to Section 1104(a)(2) in that the appointment of a Chapter 11 trustee is in the interest of the creditors, equity security holders, and other interests of the state.

4. The motions for appointment of a reorganization trustee should be granted.

Dated: April 17, 1991

/s/
LLOYD KING
Bankruptcy Judge

APPENDIX G

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

No. 91-3-1077 LK

Chapter 11

In Re: HAMILTON TAFT & COMPANY,
a California corporation,

Debtor.

ORDER FOR RELIEF UNDER CHAPTER 11

[Filed May 31, 1991]

The Involuntary Petition For Relief Under Chapter 11 of The Bankruptcy Code having been filed by FEDERAL EXPRESS CORPORATION, the STANFORD UNIVERSITY HOSPITAL and the BOARD OF TRUSTEES OF THE LELAND STANFORD JUNIOR UNIVERSITY, and VERBATIM CORPORATION, and the Court having found on a Motion For Summary Judgment that there is no genuine issue of material fact in dispute, the Summary Judgment having been entered declaring that an order for relief should be granted, and good cause appearing, it is

ORDERED that relief under Chapter 11 of the Bankruptcy Code be, and it hereby is, granted against Hamilton Taft & Company, a California Corporation.

Dated: May 31, 1991

/s/ [Lloyd King]
UNITED STATES BANKRUPTCY JUDGE

APPENDIX H

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

No. 91-3-1077 LK

Chapter 11

In Re: HAMILTON TAFT & COMPANY,
a California corporation,

Debtor.

ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT AND
MOTION TO DISMISS
IN FAVOR OF PETITIONERS

[Filed June 17, 1991]

Federal Express Corporation, The Board of Trustees of The Leland Stanford Junior University and Stanford University Hospital ("Petitioners") filed a Motion for Summary Judgment and Motion to Dismiss; or in the Alternative, Motion to (1) Grant Summary Adjudication of Issues; (2) Strike Affirmative Defenses in Answer to Involuntary Petition; (3) Bifurcate; (4) Set an Early Trial; and (5) Strike Demand for Jury Trial. Debtor filed a Cross-Motion for Summary Judgment. Due and proper notice of the motions was given. These motions were heard on May 31, 1991.

Appearing for the Petitioners were Michael H. Ahrens of Bronson, Bronson & McKinnon on behalf of Federal Express Corporation and Randy Michelson of McCutchen, Doyle, Brown & Enerson on behalf of The Board of Trustees of The Leland Stanford Junior University and Stanford University Hospital. Appearing for the Debtor were Mark E. MacDonald of Johnson & Gibbs and Lawrence A. Callaghan of Long & Levit.

In accordance with the Findings of Fact and Conclusions of Law entered this day, the Court having found that there is no genuine issue of material fact in dispute and that Petitioners are entitled to the relief they seek as a matter of law, due and proper notice of the motions having been given, and good cause appearing, it is ORDERED that:

1. Petitioners' motion for summary judgment in connection with the involuntary petition filed by Petitioners on March 20, 1991 and the Answer to Involuntary Petition and Counterclaims filed by the Debtor on March 25, 1991 is hereby GRANTED.

2. Debtor Hamilton Taft's cross-motion for summary judgment is hereby DENIED.

3. Debtor Hamilton Taft's first counterclaim for breach of contract is hereby DISMISSED with prejudice.

4. Debtor Hamilton Taft's remaining counterclaims are DISMISSED without prejudice.

Dated: June 17, 1991

/s/ [Lloyd King]
UNITED STATES BANKRUPTCY JUDGE

APPENDIX I

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

No. 91-3-1077 LK

Chapter 11

In Re: HAMILTON TAFT & COMPANY,
a California corporation,

Debtor.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

[Filed June 17, 1991]

This is a contested involuntary Chapter 11 bankruptcy. The involuntary petition was filed on March 20, 1991 by the following: Federal Express Corporation, The Board of Trustees of The Leland Stanford Junior University and Stanford University Hospital. The debtor, Hamilton Taft & Company ("Hamilton Taft" or "Debtor"), filed an answer and counterclaim on March 25, 1991. Verbatim Corporation joined as a petitioning creditor on March 22, 1991.

Federal Express Corporation, The Board of Trustees of The Leland Stanford Junior University and Stanford University Hospital ("Petitioners") subsequently filed a Motion for Summary Judgment and Motion to Dismiss; or in the Alternative, Motion to (1) Grant Summary Adjudication of Issues; (2) Strike Affirmative Defenses in Answer to Involuntary Petition; (3) Bifurcate; (4) Set an Early Trial; and (5) Strike Demand for Jury Trial. Debtor filed a Cross-Motion for Summary Judgment. Due and proper notice of the motions was given. These motions were heard on May 31, 1991. These findings of fact and conclusions of law concern those motions.

Appearing for the Petitioners were Michael H. Ahrens of Bronson, Bronson & McKinnon on behalf of Federal Express Corporation and Randy Michelson of McCutchen, Doyle, Brown & Ener-

son on behalf of The Board of Trustees of The Leland Stanford Junior University and Stanford University Hospital. Appearing for the Debtor were Mark E. MacDonald of Johnson & Gibbs and Lawrence A. Callaghan of Long & Levit.

Having considered the papers submitted and the arguments of counsel, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

There is no genuine triable issue of material fact with respect to the following:

1) Under the Petitioners' contracts with the Debtor, Hamilton Taft had a duty to pay the Petitioners' taxes by the statutory deadlines established for payment of such taxes.

2) Under the Petitioners' contracts with the Debtor, Hamilton Taft would invest Petitioners' funds only in short term, highly liquid investments, so that funds were available for tax payments on statutory deadlines.

3) Under the Petitioners' contracts with the Debtor, the breach of either one of the requirements identified in paragraphs 1 and 2, above is material.

4) Hamilton Taft did not pay all of Petitioners' taxes by the statutory deadlines.

5) Hamilton Taft did not maintain Petitioners' funds only in short term, liquid investments.

6) [Deleted]

7) To the extent that these findings of fact are conclusions of law, they are deemed conclusions of law.

CONCLUSIONS OF LAW

There is no issue of law that:

1) No bona fide dispute exists as to the claims of the Petitioners.

2) Petitioners are holders of claims against the Debtor that are not contingent as to liability or the subject of a bona fide dispute.

3) Petitioners' claims aggregate at least $5,000 more than the value of any lien on property of the Debtor securing such claims.

4) In March 1991, when they suspended performance under their contract with Hamilton Taft, Petitioners had no obligation to continue to perform.

5) As a matter of law, Petitioners are entitled to the relief they seek.

6) To the extent that these conclusions of law are findings of fact, they are deemed findings of fact.

Dated: June 17, 1991.

/s/ [Lloyd King]
United States Bankruptcy Judge

APPENDIX J

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

No. 91-3-1077 LK

Involuntary Chapter 11

In Re: HAMILTON TAFT & COMPANY,
a California corporation,

Debtor.

ORDER AUTHORIZING TRUSTEE
TO CLOSE DOWN BUSINESS OPERATIONS
OF DEBTOR

[Filed June 21, 1991]

Frederick S. Wyle, Chapter 11 trustee of Hamilton Taft & Company ("Hamilton Taft"), having filed on May 7, 1991, an "Application of Trustee for Authorization to Close Down Business Operations of Debtor", and a hearing on the application having been heard May 17, 1991, and for the reasons stated in the findings of fact and conclusions of law which will be separately issued,

IT IS HEREBY ORDERED that:

1. The trustee's application is granted.

2. The trustee is authorized to take all action necessary to close down the business operations of Hamilton Taft & Company.

Dated: JUN 21 1991

/s/ [Lloyd King]
U.S. Bankruptcy Judge

Approved as to form:

Dated: _____

JOHNSON & GIBBS

By: /s/ [Stephen C. Martin]
Attorneys for Debtor,
Hamilton Taft & Company

APPENDIX K

11 U.S.C. § 303

INVOLUNTARY CASES

(a) An involuntary case may be commenced only under chapter 7 or 11 of this title, and only against a person, except a farmer, family farmer, or a corporation that is not a moneyed, business, or commercial corporation, that may be a debtor under the chapter under which such case is commenced.

(b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title—

(1) by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute, or an indenture trustee representing such a holder, if such claims aggregate at least $5,000 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims;

(2) if there are fewer than 12 such holders, excluding any employee or insider of such person and any transferee of a transfer that is voidable under section 544, 545, 547, 548, 549, or 724(a) of this title, by one or more of such holders that hold in the aggregate at least $5,000 of such claims;

(3) if such person is a partnership—

(A) by fewer than all of the general partners in such partnership; or

(B) if relief has been ordered under this title with respect to all of the general partners in such partnership, by a general partner in such partnership, the trustee of such a general partner, or a holder of a claim against such partnership; or

(4) by a foreign representative of the state in a foreign proceeding concerning such person.

(c) After the filing of a petition under this section but before the case is dismissed or relief is ordered, a creditor holding an unsecured claim that is not contingent, other than a creditor filing under subsection (b) of this section, may join in the petition with the same effect as if such joining creditor were a petitioning creditor under subsection (b) of this section.

(d) The debtor, or a general partner in a partnership debtor that did not join in the petition, may file an answer to a petition under this section.

(e) After notice and a hearing, and for cause, the court may require the petitioners under this section to file a bond to indemnify the debtor for such amounts as the court may later allow under subsection (i) of this section.

(f) Notwithstanding section 363 of this title, except to the extent that the court orders otherwise, and until an order for relief in the case, any business of the debtor may continue to operate, and the debtor may continue to use, acquire, or dispose of property as if an involuntary case concerning the debtor had not been commenced.

(g) At any time after the commencement of an involuntary case under chapter 7 of this title but before an order for relief in the case, the court, on request of a party in interest, after notice to the debtor and a hearing, and if necessary to preserve the property of the estate or to prevent loss to the estate, may order the United States trustee to appoint an interim trustee under section 701 of this title to take possession of the property of the estate and to operate any business of the debtor. Before an order for relief, the debtor may regain possession of property in the possession of a trustee ordered appointed under this subsection if the debtor files such bond as the court requires, conditioned on the debtor's accounting for and delivering to the trustee, if there is an order for relief in the case, such property, or the value, as of the date the debtor regains possession, of such property.

(h) If the petition is not timely controverted, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed. Otherwise, after trial,

the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed, only if—

(1) the debtor is generally not paying such debtor's debts as such debts become due unless such debts are the subject of a bona fide dispute; or

(2) within 120 days before the date of the filing of the petition, a custodian, other than a trustee, receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession.

(i) If the court dismisses a petition under this section other than on consent of all petitioners and the debtor, and if the debtor does not waive the right to judgment under this subsection, the court may grant judgment—

(1) against the petitioners and in favor of the debtor for—

(A) costs; or

(B) reasonable attorney's fees; or

(2) against any petitioner that filed the petition in bad faith, for—

(A) any damages proximately caused by such filing; or

(B) punitive damages.

(j) Only after notice to all creditors and a hearing may the court dismiss a petition filed under this section—

(1) on the motion of a petitioner;

(2) on consent of all petitioners and the debtor; or

(3) for want of prosecution.

(k) Notwithstanding subsection (a) of this section, an involuntary case may be commenced against a foreign bank that is not engaged in such business in the United States only under chapter 7 of this title and only if a foreign proceeding concerning such bank is pending.

Supreme Court, U.S.
FILED
MAY 27 1993
OFFICE OF THE CLERK

No. 92-1718

In The

Supreme Court of the United States

October Term, 1992

HAMILTON TAFT & COMPANY,

Petitioner,

v.

FEDERAL EXPRESS CORPORATION, STANFORD UNIVERSITY HOSPITAL, THE BOARD OF TRUSTEES LELAND STANFORD JUNIOR UNIVERSITY FREDERICK S. WYLE AS TRUSTEE FOR HAMILTON TAFT & COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL H. AHRENS
GILMORE FREDERICK DIEKMANN, JR.*
JOSÉ H. GARCIA
CARL R. GOLDBERG
BRONSON, BRONSON & McKINNON
505 Montgomery Street
San Francisco, CA 94111
Telephone: (415) 986-4200
Attorneys for Respondent Federal Express Corporation

*Counsel of Record

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

PATRICIA S. MAR
LELAND R. SELNA*
FELDMAN, WALDMAN & KLINE
235 Montgomery Street
San Francisco, CA 94104
Telephone: (415) 981-1300
Attorneys for Respondent Frederick S. Wyle, Trustee

DAVID M. HEILBRON
RANDY MICHELSON
JOHN S. REESE*
McCUTCHEN, DOYLE, BROWN & ENERSEN
Three Embarcadero Center
San Francisco, CA 94111
Telephone: (415) 383-2000

MICHAEL H. HUDNALL
SUSAN K. HOERGER
Office of the Vice President and General Counsel
Stanford University
P.O. Box N
Stanford, CA 94309
Telephone: (415) 723-1743
Attorneys for Respondents Stanford University Hospital and the Board of Trustees of Leland Stanford Jr. University

* Counsel of Record

QUESTION PRESENTED

Should the Court review an unpublished memorandum decision affirming a determination that a bankruptcy appeal is moot where

- petitioner's failure to seek a stay allowed a comprehensive change in circumstances to occur;
- it is no longer possible to order any effective relief; and
- the decision follows established principles adhered to by every other court of appeals that has considered them?

RULE 29.1 STATEMENT

Stanford University is a trust.

Stanford University Hospital is a non-profit corporation the members of which are the individual members of the board of trustees of Stanford University.

All Federal Express Corporation subsidiaries are wholly owned.

Frederick S. Wyle is the Chapter 11 Trustee of Hamilton Taft & Company. The stock of Hamilton Taft & Company is owned by Knightsbridge Company, Inc.

TABLE OF CONTENTS

Page

JURISDICTION 2

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 5

REASONS FOR DENYING THE WRIT 6

I. Petitioner Has No Standing to Pursue This Writ in the Name of Hamilton Taft 6

II. There is No Conflict In the Circuits Regarding Whether An Appeal May Be Moot For Equitable Reasons 7

III. The Facts of this Case Establish that the Ninth Circuit and District Court Properly Dismissed Petitioner's Appeals on Grounds of Equitable Mootness 11

IV. Petitioner's Contentions that Dismissal for Mootness is Illegal or Violates Congressional Intent in Bankruptcy Cases Are Entirely Without Support 14

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES

Algeran, Inc. v. Advance Ross Corp., 759 F.2d 1421 (9th Cir. 1985) 8

Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc., 841 F.2d 79 (4th Cir. 1988) 9

In re AOV Industries, Inc., 792 F.2d 1140 (D.C. Cir. 1986) 8, 11

In re Chateaugay Corp., 988 F.2d 322 (2nd Cir. 1993) 8, 12, 15

In re Club Assoc., 956 F.2d 1065 (11th Cir. 1992) 8

In re Delaware & H. Ry. Co., 129 B.R. 388 (D.Del. 1991) 8

In re Hamady Bros. Food Markets, 110 B.R. 815 (E.D.Mich. 1990) 9

In re Information Dialogues, Inc., 662 F.2d 475 (8th Cir. 1981) 9

In re Mortgageamerica Corporation, 714 F.2d 1266 (5th Cir. 1983) 14

In re Public Service Co., 963 F.2d 469 (1st Cir.), *cert. denied*, 113 S.Ct. 304 (1992) 8

In re Quality Spice Corp., 107 B.R. 843 (D.N.J. 1989), *aff'd*, 908 F.2d 961 (3d Cir. 1990) 9

In re Roberts Farms, Inc., 652 F.2d 793 (9th Cir. 1981) 9, 11, 12, 13

In re Spirtos, No. 91-56496, 1993 U.S. App. LEXIS (9th Cir. May 11, 1993) 9

TABLE OF AUTHORITIES – Continued

Page

In re Sullivan Central Plaza, I, Ltd., 914 F.2d 731 (5th Cir. 1990) 10, 11, 15

In re Texaco, Inc., 92 B.R. 38 (S.D.N.Y. 1988) 8, 12

Matter of Combined Metals Reduction Co., 557 F.2d 179 (9th Cir. 1977) 13

Matter of Crystal Oil Co., 854 F.2d 79 (5th Cir. 1988) 9, 10, 11

Mills v. Green, 159 U.S. 651, 16 S.Ct. 132, 40 L.Ed. 293 (1895) 8

St. Paul Fire and Marine Insurance Co. v. Pepsico, Inc., 884 F.2d 688 (2d Cir. 1989) 14

Valley National Bank v. Trustee for Westgate-California Corporation, 609 F.2d 1274 (9th Cir. 1979), *cert. denied*, 444 U.S. 1015 (1980) 13

STATUTES

11 U.S.C. § 323 (1988) 7, 14

No. 92-1718

In The

Supreme Court of the United States

October Term, 1992

HAMILTON TAFT & COMPANY,

Petitioner,

v.

FEDERAL EXPRESS CORPORATION, STANFORD UNIVERSITY HOSPITAL, THE BOARD OF TRUSTEES LELAND STANFORD JUNIOR UNIVERSITY FREDERICK S. WYLE AS TRUSTEE FOR HAMILTON TAFT & COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Federal Express Corporation, Stanford University Hospital, the Board of Trustees of Leland Stanford Jr. University and Frederick S. Wyle, Trustee oppose review of a decision of the United States Court of Appeals for the Ninth Circuit affirming the district court's order dismissing as moot petitioner's appeals from four bankruptcy court orders.

JURISDICTION

Respondents assert that petitioner does not have standing to pursue this petition, as discussed more fully below in section I.

STATEMENT OF THE CASE

Petitioner's Statement of the Case and, indeed, its "Question Presented," suggest that petitioner was the innocent victim of a capricious and wholly unauthorized maneuver by Hamilton Taft & Company's creditors to place petitioner into involuntary bankruptcy. Not so. Respondents provide this supplement (based on the findings of the courts below) to set the record straight.

In March 1991, respondents Federal Express Corporation, Stanford University Hospital and Stanford University Board of Trustees discovered that at least $34 million they had sent to Hamilton Taft was not forwarded timely to the taxing agencies and that substantial tax penalties were owed. Petitioner's Appendix 3a, 11a, 20a-21a (hereinafter "Pet.App."). Upon this discovery and Hamilton Taft's failure to adequately explain its actions, they then filed an involuntary bankruptcy petition against Hamilton Taft.

On March 26, 1991, the bankruptcy court entered orders appointing Frederick S. Wyle as Trustee ("Trustee"). On May 17, 1991, it authorized the Trustee to close down Hamilton Taft's business. On May 28, 1991, the Trustee filed his First Interim Report, describing the

preliminary results of his investigation into Hamilton Taft's affairs. Pet.App. 3a.

The Trustee concluded that $55.2 million, net of repayments, had been transferred from Hamilton Taft to entities controlled by Hamilton Taft's president, Connie C. Armstrong, Jr., ("Armstrong") during the two-year period Armstrong owned Hamilton Taft. The Trustee found the money had been used for a combination of 1) speculative ventures and investments in Texas, many of which are defunct and none of which had produced any profit, 2) funding the operations of the Armstrong companies, and 3) personal luxuries for Armstrong, including a "hobby" cattle ranch, costing an estimated $10 million. According to the Trustee, Hamilton Taft owed at least $90.9 million in unpaid taxes to its clients, resulting principally from Armstrong's diversion of payroll tax deposits. Hamilton Taft had $5.8 million available to meet these liabilities. *Id.* On May 31, 1991, on a motion for summary judgment, the bankruptcy court issued an order of relief. Subsequently, four other companies controlled by Armstrong ("Texas Debtors") filed their chapter 11 cases in Texas. Pet.App. 3a, 11a.

Because neither Hamilton Taft nor Armstrong sought a stay, the Trustee took control of the business. Prior to the district court's hearing of Hamilton Taft's appeals, the Trustee:

1) shut down Hamilton Taft's business;

2) filed an adversary proceeding in the Hamilton Taft bankruptcy case against Armstrong and every entity controlled by him of which the Trustee had knowledge, seeking recovery of assets fraudulently conveyed from

Hamilton Taft, *Frederick S. Wyle v. Connie C. Armstrong, Jr., et al.*, Adv. Proc. No. 91-3-081-LK;

3) successfully pursued a motion for change of venue, transferring venue of the four Texas Debtors to San Francisco;

4) successfully obtained joint administration of the Texas Debtors' cases with that of Hamilton Taft;

5) sought and won the substantive consolidation of the Texas Debtors and Hamilton Taft, and was appointed Trustee of the consolidated estate, without opposition by any of the debtors, including Hamilton Taft;

6) was granted authorization to sell, among other numerous sale transactions, several town houses, Hamilton Taft's office equipment and furniture, luxury vehicles, cattle, horses, and other personal property; and

7) took title to Armstrong's cattle ranch.

The district court found that as a result of the substantive consolidation and other actions, the assets of the Texas Debtors are now under the control of the Trustee. Pet.App. 3a-4a, 12a-13a.

After the Trustee was appointed, further court orders were issued by the bankruptcy court authorizing or approving the Trustee's transactions as Trustee of Hamilton Taft and the Texas Debtors. These orders cover a variety of activities, including sales of assets, contracts with third parties, abandonment of assets, employment of professionals and other consultants, and the operations of Hamilton Taft and the Texas Debtors. Pet.App. 4a, 13a. At no time did Hamilton Taft or Armstrong seek a stay pending appeal.

The district court held Hamilton Taft's appeals moot on two separate and independent grounds. First, the actions taken by the Trustee had created a substantial change in circumstances that made it impossible for the district court to fashion relief. Second, by failing to seek a stay and permitting the substantial changes in circumstances to occur, Hamilton Taft had allowed the appeals to become moot for lack of equity. Pet.App. 4a, 14a.

The Ninth Circuit Court of Appeals affirmed in an unpublished memorandum decision. Noting that there were two independent grounds for finding the appeals moot, the court focused on petitioner's demand for equitable remedies. "Equitable remedies in bankruptcy proceedings are unavailable to appellants who fail to seek a stay of the bankruptcy court's objectionable orders, permitting a comprehensive change of circumstances to occur." Pet.App. 5a. The court concluded: "Not only has Hamilton [Taft] lost its claim to an equitable remedy by failing to seek a stay, but the maxim 'he who comes into equity must come with clean hands' applies here with particular force." Pet.App. 6a-7a.

SUMMARY OF ARGUMENT

Nothing in this case warrants Supreme Court review. First, the Trustee, as the duly appointed representative of Hamilton Taft's sole shareholder, has not authorized the filing of this petition. In fact, the Trustee opposes this petition. This petition is actually brought by Hamilton Taft's former president, who has no authority or standing to act on behalf of Hamilton Taft.

Second, the Ninth Circuit's unpublished memorandum decision presents no important questions of law. The decision simply applies well-recognized equitable reasons to dismiss an appeal as moot. There is no conflict with a decision of any other court of appeals.

Third, the Ninth Circuit properly found petitioner's appeals had become moot. Petitioner's failure to seek or obtain a stay resulted in a comprehensive change of circumstances making it inequitable to hear the merits of the appeals. The appeals are also moot on jurisdictional grounds because petitioner had no available or effective relief.

Fourth, equitable mootness is not illegal or violative of congressional intent. If equitable mootness deprived petitioner of its appeal, it is only because petitioner failed to seek or obtain a stay.

REASONS FOR DENYING THE WRIT

I. Petitioner Has No Standing to Pursue This Writ in the Name of Hamilton Taft

The petition purports to be filed by Hamilton Taft, as debtor, but it is not. The Trustee is the duly appointed Chapter 11 trustee of Hamilton Taft's sole shareholder, Knightsbridge Company, Inc. ("Knightsbridge"), one of the Texas Debtors. The order appointing him trustee of Knightsbridge was unchallenged, being stipulated to by Knightsbridge, which was controlled by Armstrong. That order was not appealed. Only the Trustee has the right to control the activities of Hamilton Taft, as debtor. Only the Trustee can authorize legal proceedings on behalf of the

Debtor. *See* 11 U.S.C. § 323 (1988). The Trustee did not authorize this petition for certiorari to be filed by or on behalf of Hamilton Taft. Indeed, the Trustee opposes this petition.

This petition, like the appeals below, is directed by Armstrong, the former president and chairman (and only member) of the Board of Directors of Hamilton Taft. Counsel representing petitioner are Armstrong's personal lawyers. Neither Armstrong nor his personal lawyers have any authority or standing to take any action on behalf of Hamilton Taft, much less pursue this petition. Armstrong has not appealed, and has not filed this petition in his own name. He is purporting to do so in the name of the corporation, Hamilton Taft. This he has no authority to do.

Armstrong has no authority to bring this petition. The petition should be denied.

II. There is No Conflict In the Circuits Regarding Whether An Appeal May Be Moot For Equitable Reasons.

Petitioner asserts that there is a conflict among the circuit courts as to whether equitable reasons may justify a determination that an appeal is moot. Petition for Writ of Certiorari 11-12 (hereinafter "Pet."). Petitioner is wrong – there is no circuit split.

In the bankruptcy context, an appeal may be dismissed as moot upon two grounds: jurisdictional and equitable. First, if events occur which make it impossible for an appellate court to fashion effective relief, the court

is operating outside of its Article III constraints, and the case is moot for jurisdictional reasons. *Mills v. Green*, 159 U.S. 651, 653, 16 S.Ct. 132, 133, 40 L.Ed. 293 (1895) (Article III courts decide live controversies, and do not "give opinions upon moot questions"). Second, an appeal may be dismissed as moot if implementation of any conceivable relief will be inequitable. This equitable mootness is a recognized supplement to the traditional jurisdictional mootness in bankruptcy cases which, in part, evolved from "the particular need for finality in orders regarding stays in bankruptcy." *Algeran, Inc. v. Advance Ross Corp.*, 759 F.2d 1421, 1424 (9th Cir. 1985). Equitable mootness is rooted firmly in sound notions of public policy, and promotes the orderly administration of estates by affording finality to the judgments of the bankruptcy courts. *In re Texaco, Inc.*, 92 B.R. 38, 46 (S.D.N.Y. 1988).

All courts that have addressed the issue, which include courts in the vast majority of circuits, have recognized that equitable reasons can render a case moot.[1] *See In re AOV Industries, Inc.*, 792 F.2d 1140 (D.C. Cir. 1986) (recognizing that equitable considerations may justify mootness); *In re Public Service Co.*, 963 F.2d 469 (1st Cir.) (appeal moot where requested relief inequitable or impractical because of change in circumstances), *cert. denied* 113 S.Ct. 304 (1992); *In re Chateaugay Corp.*, 988 F.2d 322 (2nd Cir. 1993) (appeal moot if inequitable to implement conceivable relief); *In re Delaware & H. Ry. Co.*, 129

---

[1] As far as respondents can determine, equitable mootness has not been addressed by courts in the Seventh and Tenth Circuits, and the Eleventh Circuit has specifically declined to decide the issue. *See In re Club Assoc.*, 956 F.2d 1065, 1068 n.10 (11th Cir. 1992).

B.R. 388 (D.Del. 1991) (appeal moot based on well-established rules of justiciability and need for finality); *In re Quality Spice Corp.*, 107 B.R. 843 (D.N.J. 1989) (equitable considerations render appeal moot), *aff'd* 908 F.2d 961 (3d Cir. 1990); *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 841 F.2d 79 (4th Cir. 1988) (appeal moot where effective relief not practically available and would create unmanageable situation for bankruptcy court); *Matter of Crystal Oil Co.*, 854 F.2d 92 (5th Cir. 1988) (appeal moot where no effort to obtain stay resulted in change of circumstances rendering it inequitable to reach merits of appeal); *In re Hamady Bros. Food Markets*, 110 B.R. 815 (E.D.Mich. 1990) (factors in determining mootness include failure to seek stay, virtues of finality and difficulty in unwinding confirmation order); *In re Information Dialogues, Inc.*, 662 F.2d 475 (8th Cir. 1981) (mootness promotes policy of finality unless stay is obtained); *In re Roberts Farms, Inc.*, 652 F.2d 793 (9th Cir. 1981) (appeal moot where failure to obtain stay results in comprehensive change in circumstances).

The Ninth Circuit recognized the two grounds justifying mootness, noting that an appeal may become moot if events "occur that make it impossible for the appellate court to fashion effective relief" *or* when failure to obtain a stay permits " 'such a comprehensive change of circumstances to occur as to render it inequitable . . . to consider the merits of the appeal.' " Pet.App. 5a (quoting *Roberts Farms*, 652 F.2d at 798).[2] This case represents no more than an apt application of equitable mootness.

---

[2] The Ninth Circuit recently held an appeal of the disbursement of estate funds not moot because there was no difficulty in fashioning effective and equitable relief. *In re Spirtos*, No. 91-56496, 1993 U.S. App. LEXIS 10550 (9th Cir. May 11, 1993). In

Relying on dicta buried in a footnote, petitioner claims that equitable reasons for mootness, particularly finality, have been rejected by the Fifth Circuit. Pet. 15-17. Petitioner is wrong.

In *In re Sullivan Central Plaza, I, Ltd.*, 914 F.2d 731 (5th Cir. 1990), the Fifth Circuit affirmed a determination that an appeal was moot where the appellate court was unable to fashion effective relief. *Id.* at 733-34. *Sullivan* involved no more than the simple application of jurisdictional mootness in a case where property that is the subject of the appeal is sold or foreclosed on during the appeal because there was no stay. Because the property has been sold or foreclosed on, it is impossible for the appellate court to fashion effective relief. Although not an issue in the case, the *Sullivan* court did recognize that other courts "also offer the need for finality as additional support for the mootness doctrine," but did not accept that reasoning as the "dominant rationale" for mootness. 914 F.2d at 734. This unremarkable dictum does not reject the equitable mootness doctrine and it does not create any conflict in the circuits.

Moreover, on facts similar to the present case, *Matter of Crystal Oil Co.*, 854 F.2d 79 (5th Cir. 1988), clearly establishes the adoption of the equitable mootness doctrine in the Fifth Circuit. In *Crystal Oil* the order confirming a plan of reorganization was not stayed pending appeal. Without a stay, the plan became effective and payments to creditors began, intercompany debts were

---

doing so, however, the court acknowledged the equitable grounds justifying mootness. *Id.* at *5-6.

canceled, and new publicly traded securities were issued. Because appellant sought only to affect future actions of the debtor, which allegedly would have no substantial adverse impact on other parties, appellant argued that effective relief was possible, and thus, the appeal was not moot. *Id.* at 81. The Fifth Circuit dismissed the appeal, noting: "We doubt that effective relief is possible, and conclude that common sense and equitable considerations require dismissal of this appeal." *Id.* (citing *AOV Industries*, 792 F.2d at 1149). According to the court, appellant should have sought a stay so its appeal could be heard before third parties relied on the plan. "An appeal may be dismissed when an appellant has made no effort to obtain a stay and has permitted 'such a comprehensive change of circumstances to occur as to render it inequitable' for the appellate court to reach the merits of the appeal." *Id.* at 82 (quoting *Roberts Farms*, 652 F.2d at 798).

Nothing in *Sullivan* suggests that the Fifth Circuit overruled its prior decision in *Crystal Oil*. The Fifth Circuit recognizes equitable mootness. There is no split of authority among the circuits. The petition should be denied.

III. The Facts of this Case Establish that the Ninth Circuit and District Court Properly Dismissed Petitioner's Appeals on Grounds of Equitable Mootness

Petitioner failed to seek or obtain a stay pending appeal of any of the four orders from the bankruptcy court or the district court. The Ninth Circuit properly

determined that petitioner's failure to seek or obtain a stay below and the resulting change in circumstances rendered its appeals moot.

An appellant who elects not to seek a stay pending appeal accepts the risk that its appeal will be dismissed as moot. *In re Chateaugay Corp.*, 988 F.2d 322, 326 (2d Cir. 1993); *In re Roberts Farms, Inc.*, 652 F.2d 793, 798 (9th Cir. 1981). Under circumstances such as those here, "it is incumbent upon a party to seek a stay lest the appeal in question be rendered moot by constitutional or equitable/jurisprudential reasons." *In re Texaco, Inc.*, 92 B.R. 38, 44-45 (S.D.N.Y. 1988).

After appointment of the Trustee and entry of the order for relief, Hamilton Taft failed to seek a stay pending appeal from the bankruptcy court. Nor did it seek a stay from the district court or the court of appeals. Instead, Hamilton Taft acquiesced in the continued progress of the bankruptcy case, as controlled by the Trustee. As a result, Hamilton Taft's business was shut down, adversary proceedings were filed against Armstrong and others for recovery of fraudulent conveyances, venue of the Texas Debtor's bankruptcy case was changed, the Texas Debtors and Hamilton Taft bankruptcy cases were substantively consolidated, and various assets of Hamilton Taft were sold by the Trustee. These subsequent events resulted in a substantial change in circumstances. As the district court and the circuit court correctly determined, the comprehensive change in circumstances made it inequitable to hear the merits of the appeals. Pet.App. 6a, 14a. *See Roberts Farms*, 652 F.2d at 798. As a consequence of its failure to seek a stay, petitioner's appeals became moot.

Petitioner argues that if the order for relief were reversed, it could pursue a damage claim against the respondents and take over what is left of Hamilton Taft. This theoretical remedy, petitioner argues, constitutes effective relief and prevents these appeals from being moot. As the Ninth Circuit observed, petitioner misses the point – the appeal is moot on equitable grounds. Pet.App. 6a.

Petitioner's argument is wrong in any event. An appeal will be considered moot if the court is unable to grant any *effective* relief. *See e.g., Matter of Combined Metals Reduction Co.*, 557 F.2d 179 (9th Cir. 1977); *Roberts Farms*, 652 F.2d 793. No effective relief can be granted in this case. The relief petitioner seeks, based on only one of the myriad of interrelated bankruptcy court orders, is neither available nor effective.

First, the order for relief cannot be isolated. Where the "facts make it difficult, if not impossible, to fashion an equitable remedy that would restore appellants to their former positions," as in this case, an appeal should be dismissed as moot. *Valley National Bank v. Trustee for Westgate-California Corporation*, 609 F.2d 1274, 1283 (9th Cir. 1979) (citing *Matter of Combined Metals*, 557 F.2d 179), *cert. denied*, 444 U.S. 1015 (1980). Attempting to undo each and every order here would wreak havoc in an already complex bankruptcy case.

Because petitioner failed to seek or obtain a stay, the comprehensive change in circumstances that occurred cannot be unraveled. No relief can resuscitate the Hamilton Taft business, or undo the numerous sales of assets, the change of venue, the substantive consolidation of the

Texas Debtors and Hamilton Taft, or the adversary proceedings to recover from Armstrong and other third parties who received Hamilton Taft assets.

Second, even if the order for relief could be isolated and overturned, Armstrong could not pursue a damage claim against the respondents. Any damage claim that might exist belongs to the Trustee. Once a right of action passes to the Trustee as property of the estate, the debtor or any other party lacks standing to pursue it. 11 U.S.C. § 323 (1988); *St. Paul Fire and Marine Insurance Co. v. Pepsico, Inc.*, 884 F.2d 688, 700 (2d Cir. 1989); *In re Mortgageamerica Corporation*, 714 F.2d 1266 (5th Cir. 1983). Moreover, even if the order for relief could be overturned, as a practical matter the Trustee would not be ousted because he was subsequently appointed Trustee of the substantively consolidated cases. That order was never appealed. Thus, the relief petitioner seeks is neither available, nor effective.

As the Ninth Circuit properly found, petitioner's failure to obtain a stay resulted in a comprehensive change in circumstances that made it inequitable to hear the merits of the appeals. Further, even if the order for relief were reversed, petitioner would still lack effective relief. Therefore, the case was properly deemed moot. The petition should be denied.

IV. Petitioner's Contentions that Dismissal for Mootness is Illegal or Violates Congressional Intent in Bankruptcy Cases Are Entirely Without Support.

Respondents do not take issue with petitioner on the serious nature and requirements of involuntary petitions

for bankruptcy. These points, however, are not at issue in this or any previous appeal.

Petitioner's argument that equitable mootness is illegal is unsupported by any authority. Petitioner provides absolutely no evidence of congressional intent showing that an order on an involuntary petition may not become moot on appeal.

Petitioner complains that it has been deprived of its statutory rights of appeal. Pet.11. Not so. By failing to *ever* seek a stay pending appeal, petitioner ran the risk that its appeals would become moot. *See In re Chateaugay Corp.*, 988 F.2d 322, 326 (2d Cir. 1993) ("The party who appeals without seeking to avail himself of . . . protection [of a stay] does so at his own risk."). If petitioner's appeals have been precluded, it is only because of petitioner's own inaction and failure to protect and preserve its rights. Petitioner cannot complain. Indeed, in *In re Sullivan Central Plaza, I, Ltd.*, 914 F.2d 731 (5th Cir. 1990), the case that petitioner incorrectly claims rejects equitable mootness, the court recognized that while dismissing an appeal as moot insulates bankruptcy court orders from review, the debtor could have avoided this by obtaining a stay of the order pending appeal. *Id.* at 736. Similarly, in the present case, petitioner's own conduct has precluded its appeals.

Moreover, as the Ninth Circuit concluded: "Not only has Hamilton [Taft] lost its claim to an equitable remedy by failing to seek a stay, but the maxim 'he who comes into equity must come with clean hands' applies here with particular force." Pet.App. 6a-7a.

There is nothing illegal or violative of congressional intent when an appeal of a bankruptcy order is found moot. It is a clear, well established judicial doctrine, which does not warrant Supreme Court review. The petition should be denied.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

MICHAEL H. AHRENS
GILMORE FREDERICK DIEKMANN, JR.*
JOSÉ H. GARCIA
CARL R. GOLDBERG
BRONSON, BRONSON & McKINNON
505 Montgomery Street
San Francisco, CA 94111
Telephone: (415) 986-4200
Attorneys for Federal Express Corporation

PATRICIA S. MAR
LELAND R. SELNA*
FELDMAN, WALDMAN & KLINE
235 Montgomery Street
San Francisco, CA 94104
Telephone: (415) 981-1300
Attorneys for Frederick S. Wyle, Trustee

DAVID M. HEILBRON
RANDY MICHELSON
JOHN S. REESE*
McCUTCHEN, DOYLE, BROWN & ENERSEN
Three Embarcadero Center
San Francisco, CA 94111
Telephone: (415) 383-2000

MICHAEL H. HUDNALL
SUSAN K. HOERGER
Office of the Vice President and General Counsel
Stanford University
P.O. Box N
Stanford, CA 94309
Telephone: (415) 723-1743
Attorneys for Stanford University Hospital and the Board of Trustees of Leland Stanford Jr. University

*Counsel of Record

May 27, 1993

No. 92-1718

Supreme Court, U.S.
FILED
JUN 4 1993
OFFICE OF THE CLERK

In The Supreme Court of the United States

OCTOBER TERM, 1992

HAMILTON TAFT & COMPANY,
Petitioner,

v.

FEDERAL EXPRESS CORPORATION,
STANFORD UNIVERSITY HOSPITAL, THE BOARD OF TRUSTEES OF LELAND STANFORD JUNIOR UNIVERSITY, AND FREDERICK S. WYLE AS TRUSTEE FOR HAMILTON TAFT & COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONER

JACK T. FRIEDMAN
DAVID M. RICE*
CARROLL, BURDICK & McDONOUGH
44 Montgomery Street, Suite 400
San Francisco, CA 94104
Telephone: (415) 989-5900
Attorneys For Hamilton Taft & Company

June 4, 1993

*Counsel of Record

BEST AVAILABLE COPY

No. 92-1718

In The Supreme Court of the United States

OCTOBER TERM, 1992

HAMILTON TAFT & COMPANY,
Petitioner,

v.

FEDERAL EXPRESS CORPORATION,
STANFORD UNIVERSITY HOSPITAL, THE BOARD OF TRUSTEES OF
LELAND STANFORD JUNIOR UNIVERSITY, AND
FREDERICK S. WYLE AS TRUSTEE FOR
HAMILTON TAFT & COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONER

Petitioner Hamilton Taft & Company files this reply in support of its petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

A. Respondents Never Address the Appropriateness of the Equitable Mootness Doctrine in the Context of *Involuntary* Bankruptcy Proceedings

Respondents' opposition to Hamilton Taft's petition is noteworthy primarily for what it omits — an analysis of the propriety of the equitable mootness doctrine in the context of *involuntary* bankruptcy proceedings. Respondents do not cite a single case in their opposition involving an involuntary proceeding, nor do they ever cite 11 U.S.C. section 303 itself. In fact, Respondents never address head on the central issue in this petition: whether appeal from a bankruptcy court order for relief can be moot when, if the order were reversed, the debtor could seek damages under 11 U.S.C. section 303(i).

In every case cited by Respondents addressing mootness, the debtor had *voluntarily* submitted to the jurisdiction of the bankruptcy courts — a process commonly referred to as "seeking the protection" of the bankruptcy courts. *See* 11 U.S.C. § 301. But Hamilton Taft did not "seek the protection" of the bankruptcy courts; Hamilton Taft was dragged to and through the bankruptcy courts against its will.

A debtor who willingly submits to bankruptcy court jurisdiction obviously will never have a right to recover monetary damages from anyone on the ground that the bankruptcy petition was improperly filed. Moreover, to the extent that such a debtor is unwilling or unable to seek a stay of proceedings, at least the debtor put *itself* into a forum where an equitable mootness doctrine might be used to foreclose appellate review.

Hamilton Taft, on the other hand, as an involuntary debtor, *does* have a right to recover monetary damages if it can establish that it was improperly placed into bankruptcy. This right is expressly granted by statute. 11 U.S.C. § 303(i); *In re Salmon*, 128 B.R. 313, 315 (M.D. Fla. 1991) ("Congress clearly created a remedy for malicious prosecution in the form of a bad faith filing of an involuntary petition in bankruptcy."). The opinions cited by Respondents, to the extent that they in fact applied an equitable mootness doctrine, did not do so in a manner that cut off a debtor's statutory right to recover monetary damages as compensation for being improperly subjected to the jurisdiction of the bankruptcy courts in the first instance. But the district court in this case did just that to Hamilton

Taft. And the Ninth Circuit affirmed. Other involuntary debtors can and will meet the same fate if the lower courts' equitable mootness rationale prevails. That is why the Court should grant this petition.

B. The Debtor Has Standing

Respondents, in both the district court and the Ninth Circuit, raised the same lack of "standing" argument that they raise again in their opposition here. Respondents argued below that only the court-appointed Trustee for Hamilton Taft, and not the debtor itself, could decide whether to pursue an appellate remedy from the bankruptcy court's orders. The lower courts here both properly ignored this argument. Pet. App. 1a-15a.

The real party in interest in an appeal challenging the appropriateness of bankruptcy court orders directed against an involuntary debtor is the debtor itself, not a court-appointed trustee. *See In re Nucor, Inc.*, 118 B.R. 788, 790-91 (D. Colo. 1990). This is particularly true where, as here, the challenged orders include the order for relief and the order appointing the trustee.

In *In re Nucor*, the court-appointed bankruptcy trustee moved to dismiss the involuntary debtor's appeal from the order for relief on the ground that the trustee was the only party with standing to pursue such an appeal. The district court denied the motion, pointing out:

> This is an appeal by Nucor, Inc. of the order which originally put the company into bankruptcy. Nucor, Inc. is the appellant and the real party in interest. It is not an appeal by the subsequently-created bankruptcy estate, which is administered by the trustee. Consequently, the party with authority to dismiss the appeal is Nucor, Inc., not the trustee.

118 B.R. at 790-91.

Like the debtor in *Nucor*, Hamilton Taft has standing to appeal the bankruptcy court and district court orders in its own name. The Trustee may not prohibit those appeals, even though he has obtained possession of the debtor's stock, because the corporation, as the real party in interest, has the right to prove that

the proceedings by which the trustee was able to obtain such control were improperly filed in the first instance. It defies reason and equity to say that the Trustee can shield himself from appellate review of bankruptcy court rulings on which the validity of his own appointment and power depends by simply refusing to consent to the appeal.

C. The Debtor's Effective Remedy Is Its Statutorily Authorized Right to Seek Damages from the Parties Who Filed the Involuntary Petition

Finally, Respondents beg the very issue presented when they argue that the debtor has no effective remedy because the trustee has effectively destroyed Hamilton Taft. The relevant remedy at issue in this petition is Hamilton Taft's right to recover statutorily authorized monetary damages under 11 U.S.C. section 303(i). Such a remedy may or may not restore Hamilton Taft to something like the condition it was in before petitioners filed their involuntary petition and the trustee got his hands on the company. Indeed, it will be true in many cases where an involuntary petition has been filed improperly that the debtor's prospects for recovery are tenuous. *See, e.g., In re R. Eric Peterson Constr. Co.*, 951 F.2d 1175, 1177 (10th Cir. 1991) (involuntary petition had "disastrous effect on [debtor's] financial health"); *Paradise Hotel Corp. v. Bank of Nova Scotia*, 842 F.2d 47, 48 (3d Cir. 1988) (involuntary petition undermined debtor's relations with its creditors, forcing debtor to file its own Chapter 11 petition). Nevertheless, understandably, Congress did not declare that section 303(i) is inapplicable where the harm has been most egregious.

If the debtor can establish on appeal that the petition was improperly filed, and the bankruptcy court orders are reversed, the debtor at least regains control of its own operations and has the right to direct its own future free of the trustee, even if that merely means taking control of its own bankruptcy estate. This is a right that Hamilton Taft, and other involuntary debtors in similar circumstances, will never have a chance to exercise if appellate review of bankruptcy court orders of the sort involved here can forever be foreclosed by the application of an equitable mootness doctrine.

Moreover, as is explained in the petition (and is unrebutted in the opposition), allowing meaningful appellate rights under such

circumstances would discourage those who might otherwise use the threat of involuntary bankruptcy proceedings as an improper means to coerce payment of disputed debts, or to satisfy other ulterior motives. *See, e.g.*, *In re Reid*, 854 F.2d 156, 159 (7th Cir. 1988) (11 U.S.C. § 303(i) was enacted "in recognition of the serious harm inflicted upon alleged debtors when involuntary petitions are wrongfully filed"); *In re Salmon*, 128 B.R. at 316 ("A bad faith filing goes not only to Salmon's filing of the involuntary petition, but also goes to the utilization of the entire bankruptcy system."); *In re SBA Factors of Miami, Inc.*, 13 B.R. 99, 101 (Bankr. S.D. Fla. 1981) (finding it "obvious that the use of the bankruptcy court as a routine collection device would quickly paralyze this court").

CONCLUSION

For these reasons, as well as for the reasons in the petition itself, the petition should be granted.

Respectfully submitted,

JACK T. FRIEDMAN
DAVID M. RICE*
CARROLL, BURDICK & McDONOUGH
44 Montgomery Street, Suite 400
San Francisco, CA 94104
Telephone: (415) 989-5900
Attorneys For Hamilton Taft & Company

June 4, 1993

*Counsel of Record